IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1515

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

On March 6, 1978, in No. A-688, this Court granted the application of petitioner The Long Island Rail Road Company ("LIRR")[1] for a stay, pending the filing and disposition of this petition, of the judgment of the United States Court of Appeals for the Fifth Circuit insofar as it deprived the LIRR of the use of a 12.5% interim terminal surcharge.

The LIRR now asks this Court to grant certiorari to review the decision of the Court of Appeals vacating and remanding the Interstate Commerce Commission ("ICC") order that approved the LIRR's permanent terminal sur-

[1] The LIRR is a wholly owned subsidiary of the New York Metropolitan Transportation Authority, a New York public benefit corporation that receives substantial grants from federal, state and local governments.

charge. In the alternative, the LIRR requests the Court to grant certiorari and summarily reverse the decision of the Court of Appeals insofar as that decision deprives the LIRR of the use of the proceeds of the interim surcharge before there is a final determination on the LIRR's request for a permanent rate increase.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (App. A) is reported at 565 F.2d 327. The Second Supplemental Report and Order of the Interstate Commerce Commission (App. B) are reported at 350 I.C.C. 673, 705 (1975), and the ICC order on reconsideration (App. C) is dated November 23, 1976. The opinion of the three-judge court in *Long Island Rail Road* v. *United States* (App. D) is reported at 388 F. Supp. 943. This Court's order on the LIRR's Application for Stay (App. E) is dated March 6, 1978.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on December 27, 1977, and a timely petition for rehearing was denied by order (App. F), dated January 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals thwart the purpose of the Railroad Retirement Amendments and frustrate the final judgment of a three-judge court when it deprived the LIRR of the immediate use of its interim terminal surcharge?

2. Did the decision of the Court of Appeals to vacate and remand the ICC's approval of the LIRR's permanent rate increase—

(a) improperly disregard the language and intent of the Railroad Retirement Amendments permitting railroads to recover their increased railroad retirement tax obligations from increased interstate freight rates;

(b) improperly ignore the finding of the ICC that there was no other feasible way for the LIRR to obtain additional revenue to meet its increased railroad retirement tax obligations; and

(c) impose additional burdens on taxpayers who already subsidize LIRR freight services?

3. Did the Court of Appeals misapply the statute governing the divisions of joint rates and thereby deprive the LIRR of prompt approval of an interstate freight rate increase specifically authorized by Congress?

STATUTORY PROVISIONS INVOLVED

The Railroad Retirement Amendments of 1973, Pub. L. 93-69, 87 Stat. 162, and the statute governing divisions of joint rates, 49 U.S.C.A. § 15(6) (Supp. 1977), are reproduced in App. G.

STATEMENT

In 1973, Congress enacted the Railroad Retirement Amendments of 1973 ("RR Amendments"), Pub. L. 93-69, 87 Stat. 162 (App. G). These amendments required railroads to increase their tax contributions to the Railroad Retirement Fund for all employees of every railroad engaged in interstate freight operations, including employees engaged solely in local operations.[2] As part of the same enactment, Congress amended the Interstate Commerce Act to permit railroads, individually or by groups,

[2] 45 U.S.C. § 228a(b) (1970), *as revised* by the Railroad Retirement Act of 1974, Pub. L. 93-445, 88 Stat. 1305 (current version at 45 U.S.C. § 231(b) (Supp. V 1975)).

to pass the cost of this tax increase on to customers of their interstate freight service.[3]

Mindful of substantial revenue losses caused by ICC delays in approving railroad rate increases, Congress directed virtually automatic ICC approval of interim rate increases to offset the increased retirement taxes.[4] Congress also established procedures for ICC approval of permanent rate increases under the RR Amendments.[5] With respect to these permanent increases, Congress made it clear that while the ICC could authorize general increases, it also had authority to take into account the financial condition of a particular carrier.[6]

Railroads other than the LIRR petitioned for a general increase in their freight rates of 2.0% effective October 1, 1973, and 2.7% effective January 1, 1974, to offset their increased railroad retirement taxes. But the LIRR had a special problem. The LIRR derives approximately 90% of its revenue from intrastate passenger service and only 10% from interstate freight service. While the RR Amendments required the LIRR to increase its retirement tax contributions on behalf of all employees, including those engaged in intrastate passenger operations, the RR Amendments authorized an interim rate increase in inter-

[3] 49 U.S.C.A. § 15a(6) (Supp. 1977), Pub. L. No. 93-69, § 201(4), 87 Stat. 166-68 (App. G).

[4] 49 U.S.C.A. § 15a(6)(b) (Supp. 1977), Pub. L. No. 93-69, § 201(4), 87 Stat. 166 (App. G).

[5] Congress provided that in making this determination, the ICC "may take into account all factors appropriate to ratemaking generally under this chapter and shall determine such final rates under the standards and limitations applicable to ratemaking generally under this chapter." 49 U.S.C.A. § 15a(6)(c) (Supp. 1977), Pub. L. No. 93-69, § 201(4)(c), 87 Stat. 166-67 (App. G).

[6] For example, the Senate Commerce Committee stated: "While the present financial conditions of some carriers may justify 'pass through' of the expense increases, this may not be the case with all carriers." S. Rep. No. 93-221, 93d Cong., 1st Sess. 3 (1973).

state freight rates. Because of the LIRR's small percentage of interstate operations, a general freight rate increase equivalent to that sought by other railroads would have recovered only approximately $269,000 of the LIRR's more than $6 million increase in annual retirement tax obligations.

To obtain the revenue needed to offset its increased taxes, the LIRR sought permission to impose a different form of interim increase in interstate freight rates: a terminal surcharge on all interstate freight originating or terminating on the LIRR system. The ICC rejected the LIRR's interim terminal surcharge on the ground that the surcharge was not an appropriate method of effecting the interim rate increase. Increases in Freight Rates and Charges to Offset Retirement Tax Increases-1973, 346 I.C.C. 305 (1973).

A three-judge court in the Eastern District of New York reversed this decision and, over the objections of most of the railroad parties to this case, required the ICC to accept the LIRR's interim terminal surcharge. *Long Island Rail Road* v. *United States*, 388 F. Supp. 943 (E.D. N.Y. 1974) (App. D). No party appealed from the ruling of the three-judge court, and it became the final decision governing the LIRR's interim rates pending final determination of the LIRR's permanent rate increase.

Subsequently, the ICC allowed the LIRR to increase its interim surcharge to 12.5%.[7] At this level, the surcharge falls slightly short of providing sufficient revenue to cover the LIRR's increased retirement tax costs. Even with the surcharge, the LIRR's interstate freight operations generate a deficit[8] which is offset solely by public grants from the State of New York. To illustrate the magnitude

[7] The surcharge was 3.5% beginning October 8, 1973; 5.5% beginning January 1, 1974; and 12.5% beginning December 19, 1974.

[8] 350 I.C.C. at 711 (App. B 51b).

of this burden, the LIRR's freight operations for calendar 1976 had gross revenues of approximately $12,000,000 (excluding approximately $6,800,000 in receipts from the interim surcharge used to cover increased retirement taxes for passenger service) and gross expenses of approximately $28,450,000. New York taxpayers shouldered the resulting cash deficit of approximately $16,450,000.

When the LIRR's 12.5% surcharge is added to the existing joint rates, interstate shippers pay no more to ship to LIRR points than to nearby points served by other railroads. This circumstance, coupled with the fact that the LIRR's charges, including the surcharge, are insufficient to cover the costs of the LIRR's freight operations, may explain why no shipper is now protesting the surcharge.

In addition, Consolidated Rail Corporation ("ConRail") has agreed to the LIRR's tariffs, including the surcharge. Most of the northern railroads do not object to the surcharge. Only the southern and western railroads[9]—already subsidized by New York's taxpayers—challenge the surcharge. These railroads seek to impose even greater burdens upon the LIRR and the taxpayers who support it.

Late in 1976, following full hearings, the ICC approved the LIRR's petition for a permanent 12.5% terminal surcharge.[10] The ICC did so only after rejecting a plan, acceptable to the LIRR, for pooling a general rate increase so that every railroad would have received additional reve-

[9] The Norfolk & Western Railway Company joined the southern and western railroads before the Court of Appeals. The Chesapeake & Ohio Railway and the Baltimore & Ohio Railroad intervened in the Court of Appeals and concurred in the briefs filed by the southern and western railroads.

[10] The ICC first approved the permanent surcharge on October 15, 1975 in a Second Supplemental Report and Order, 350 I.C.C. 673, 705 (1975) (App. B 1b, 44b), but this order did not become effective until after the ICC denied a petition for reconsideration on November 23, 1976 (App. C).

nues sufficient to cover its increased railroad retirement taxes and none would have received a windfall profit. 350 I.C.C. at 676, 708 (App. B 5b, 48b). In approving the surcharge, the ICC rejected a claim that the LIRR's intrastate passenger operations or its stockholder should bear the LIRR's increased railroad retirement tax obligations:

> In many general increase proceedings, we have held that if the passenger service, inevitably and inescapably, could not bear its direct costs or its share of joint or indirect costs, such passenger deficit must be taken into account in adjustment of freight rates and charges. *We reach the same conclusion in regard to the terminal surcharge of the Long Island*, and find that there is nothing unlawful in using it to offset its total increased retirement taxes, including those of employees engaged in commuter and other passenger service. 350 I.C.C. at 715 (App. B 57b) (emphasis added).

Thus, the ICC made an explicit finding that the LIRR's passenger service would "inevitably and inescapably" fail to bear its costs and that the LIRR should recover its increased taxes out of interstate freight rates as Congress had intended.

The ICC recognized that the LIRR's terminal surcharge would increase both the total transportation charges on traffic to or from the LIRR system and the LIRR's resulting fractional share of such total charges. But the ICC found that the surcharge did not constitute an illegal change in divisions of joint rates and was justified—indeed, necessitated—if the LIRR were to recoup its increased costs as authorized by Congress without giving other carriers a windfall.

First, the ICC recognized that the LIRR occupied a "unique" position. The LIRR's participation in the general increase allowed the other railroads would not have produced the revenue needed to offset its increased rail-

road retirement taxes, particularly since the other carriers had opposed a pooling arrangement under which every carrier would have recovered its increased retirement taxes and no more. 350 I.C.C. 676, 708 (App. B 5b, 48b). Second, the ICC recognized that the LIRR needed a general rate increase of at least 37.5 percent to recoup its added retirement taxes solely through its division of joint line haul rates. 350 I.C.C. 706 (App. B 44b). Obviously such an increase would have given the other carriers a huge windfall and would have been inconsistent with the public interest in maintaining fair rates for shippers. Third, the ICC found that the LIRR's terminal surcharge was a separate add-on charge which did not affect the amount of revenue other carriers received from existing joint rates and therefore did not illegally alter the divisions of joint rates.[11]

The western and southern railroads petitioned the United States Court of Appeals for the Fifth Circuit to review the ICC order. The Court of Appeals, per Senior District Judge Wyzanski, set aside the ICC order and remanded the matter to the ICC. The Court of Appeals held that the ICC had failed to provide a "reasoned explanation" for declining to impose the retirement tax burden on intrastate passenger operations or on the LIRR stockholder. 565 F.2d at 335 (App. A 12a-14a). In the alternative, although the Court of Appeals acknowledged that the LIRR surcharge did not change the divisions of joint rates within the meaning of the language in 49 U.S.C.A. § 15(6) (Supp. 1977) (App. G), it nevertheless held that the ICC decision had the economic effect of altering the divisions of joint rates and lacked the support of findings justifying that economic effect. 565 F.2d at 335 (App. A 12a-15a).

[11] Joint rates are defined by ICC regulation to include only those rates agreed to by the participating carriers and do not necessarily include all charges that a shipper pays in shipping from one point to another. 49 C.F.R. §§ 1300.0(b)(3), 1310.0(f)(16) (1976).

The Court of Appeals restored the LIRR's interim 12.5% terminal surcharge pending the ICC's ultimate approval of a permanent rate increase.[12] Then, *sua sponte* and without explanation, the Court of Appeals ordered the LIRR to keep "all sums hereafter received as a consequence of the 12.5 percent interim surcharge" in a separate trust fund. 565 F.2d at 335 (App. A 16a). The Court of Appeals made no effort to reconcile its trust fund requirement with the judgment of the three-judge court which entitled the LIRR to collect the interim surcharge and to use the proceeds to pay the increased taxes already due under the RR Amendments.

On February 14, 1978, after exhausting its remedies before the Court of Appeals, the LIRR applied to this Court for a stay of the Court of Appeals' judgment pending the LIRR's timely filing of a petition for certiorari. On March 6, 1978, this Court stayed the judgment of the Court of Appeals pending consideration of this petition insofar as the Court of Appeals directed the LIRR to keep the proceeds of the 12.5% interim surcharge in a separate trust fund (App. E).

REASONS FOR GRANTING THE WRIT

There are compelling reasons for this Court to grant certiorari and summarily reverse the Court of Appeals' decision to impose a trust fund on the LIRR's *interim* terminal surcharge. A three-judge court expressly approved the LIRR's collection and use of the proceeds of the interim terminal surcharge in a decision that is now final.[13] The ICC and the United States have advised this

[12] The Court of Appeals ordered all railroads to incorporate the LIRR's 12.5% interim surcharge into their tariffs for shipments to and from points on the LIRR.

[13] *Long Island Rail Road* v. *United States*, 388 F. Supp. 943 (E.D.N.Y. 1974) (App. D). All of the protesting railroads had an opportunity to intervene in the proceeding before the three-judge court. Some of them did so, but no party appealed.

Court that "the interim surcharge approved by the three-judge court was to remain effective until a permanent surcharge was in place" and that there was "no basis in these circumstances for the court of appeals to impress a trust on the proceeds of this surcharge." [14]

The LIRR, the ICC and the United States are supported in this view by both the express language and the legislative history of the RR Amendments. Congress considered the possibility that interim rates might exceed the permanent rates finally approved by the ICC, but declined to give the ICC power to impose an escrow to solve this problem.[15] Instead, Congress gave the ICC authority to refund the amount, if any, that the interim rate increase exceeded the permanent rate ultimately approved by the ICC.[16] Clearly, Congress intended the railroads to have the use of the proceeds of the interim rate increase until there was a final determination on a permanent rate increase,[17] and we submit that this Court

[14] Memorandum for the United States and the Interstate Commerce Commission, filed in this Court on March 1, 1978, at p. 2 n.2, p. 3 n.6.

[15] The Conference Report of the RR Amendments states:

> The Commission could withhold permission to file tariffs if it found that the proposed increase clearly exceeded the amount needed to cover the increases in costs, but otherwise once the tariffs were filed[,] the Commission would have *no* authority to suspend them pending final determination.

Joint Explanatory Statement of the Committee of the Conference, H.R. Rep. No. 93-319, 93d Cong., 1st Sess. 12 (1973) (emphasis added).

[16] 49 U.S.C.A. § 15a(6)(c), Pub. L. No. 93-69, § 201(4)(c), 87 Stat. 166-67 (App. G).

[17] The Court of Appeals' escrow order does not protect any party to this case. The carriers that object to the LIRR's terminal surcharge do not pay the surcharge and have no equitable interest in depriving the LIRR of the immediate use of badly needed operating funds. Accordingly, they do not have a claim against the trust fund ordered by the Court of Appeals.

[Footnote continued on page 11]

so recognized when it granted the LIRR's Application for Stay (App. E).

There are also compelling reasons why this Court should grant certiorari to review the Court of Appeals' decision in its entirety. In drafting the RR Amendments, Congress had to accommodate several conflicting interests: the railroad workers' need for increased pension benefits, the commensurate revenue demands of railroads participating in a pension scheme threatened with bankruptcy [18] and the consumer's interest in preserving railroad routes in precarious financial condition. To make this accommodation, Congress authorized specific rate increases to fund the increased retirement tax obligations imposed by the RR Amendments and established expedited procedures to guarantee that these increases would be forthcoming.

At the instance of railroads having no claim to any part of the LIRR surcharge, the Court of Appeals upset

[17] [Continued]

Shippers pay the LIRR's surcharge, but no shipper has sued to bar collection of the surcharge. No shipper is even a party to this proceeding. And if a shipper were a party, its equitable claim would not be a strong one. Even with the addition of the surcharge, shippers pay no more to ship to LIRR points than to other points in the New York City rate group.

It is the taxpayer who would be injured by the escrow. Even with the surcharge, the LIRR's freight operations generate a substantial deficit that is made up by subsidies from New York State. A refund to shippers of the surcharge held in trust would only increase the public subsidy that they already receive when they ship to LIRR points.

[18] "Rapidly declining levels of employment in the railroad industry in recent years have brought about a situation in which there are 1.6 people drawing benefits each month from the railroad retirement fund for every one person paying taxes into the fund . . . . As a result, income to the program is less than outgo, and if benefits are continued at present levels and if no additional revenues are provided, the railroad retirement system will be bankrupt in the mid-1980's." H.R. Rep. No. 93-204, 93d Cong., 1st Sess. 5 (1973).

that balance. In doing so, the Court of Appeals misconstrued both the RR Amendments and its own role in reviewing an expert agency's administrative determination.[19] Unless this Court corrects these errors, they will endanger future Congressional efforts to force administrative agencies, here the ICC, to respond promptly to the difficult problems that confront our transportation systems.

This case cries out for this Court's intervention in the name of equity. This case pits the southern and western railroads, among the largest and most profitable in the Nation, against a small, deficit-ridden railroad supported by taxpayers. The big railroads entered into an agreement to help solve their labor problems by increasing railroad retirement taxes on all railroad employees.[20] As the *quid pro quo* for agreeing to higher retirement taxes, the big railroads obtained labor support for immediate pass-through of the increased retirement taxes on all railroad employees, including employees engaged solely in local operations, to *interstate freight* shippers. Based on this agreement, Congress enacted the RR Amendments.

When the ICC, acting pursuant to the RR Amendments, directed the carriers to submit a plan to pool a

[19] " 'The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' " *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973) *quoting*, *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942). See also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, —— U.S. ——, 46 U.S.L.W. 4301 (U.S. April 3, 1978) (No. 76-419).

[20] Agreement Between Railway Labor and Management Initialed March 7, 1973, reprinted as Appendix A to S. Rep. No. 93-202, 93d Cong., 1st Sess. 35 (1973).

general rate increase to prevent some carriers from recovering more than their added retirement tax expenses while others recovered less, the big railroads resisted. 350 I.C.C. at 676 (App. B 5b). As a reward for their resistance, the southern railroads were not only permitted to include the increased taxes on their employees engaged in local operations but also to receive a $2.2 million annual windfall. 350 I.C.C. at 676 (App. B 6b).

Since the 2.7% general rate increase supported by the big railroads would have allowed the LIRR to recoup less than 5% of its increased railroad retirement taxes, it was forced to request its own surcharge. The LIRR, however, offered to cancel its surcharge, if the other carriers agreed to a pooling plan that would have permitted every carrier to recover only its increased retirement taxes and would have prevented any carrier from achieving a windfall. 350 I.C.C. at 708 (App. B 48b). Not only did the southern and western railroads oppose such an equitable plan; not only do they now seek to bar the LIRR from receiving the same favorable pass-through treatment from which they have benefited;[21] they have also concocted a "divisions" argument to add to their own windfall profits by claiming a part of the LIRR's surcharge.

This Court should grant certiorari and reverse the recognition below of such a wholly unjustified and inequitable claim.

[21] The southern and western railroads secured Congressional approval of the RR Amendments by entering into and presenting to Congress an agreement that the increases in railroad retirement costs would be offset by "prompt freight rate increases." These railroads have offset the retirement taxes attributable to their intrastate employees against interstate freight rates. They should be estopped from arguing that the LIRR cannot do the same thing.

UNDER THE GUISE OF JUDICIAL REVIEW, THE COURT OF APPEALS MISCONSTRUED THE RR AMENDMENTS AND SUBSTITUTED ITS JUDGMENT FOR THAT OF AN EXPERT AGENCY.

The Court of Appeals set aside the ICC's order for failure to achieve "reasoned compliance" with 49 U.S.C.A. § 15a(6)(c) added by the RR Amendments, which requires the ICC to employ "standards and limitations applicable to ratemaking generally" in approving permanent rate increases. In the court's view, the ICC departed from ordinary ratemaking principles, because it had failed to determine whether the LIRR's intrastate service could bear its own costs through increased passenger fares or whether the LIRR stockholder would absorb the increased retirement tax costs.

There are two fatal deficiencies in the court's analysis. First, under the RR Amendments, the ICC was not required to make these findings. Second, the ICC did in fact make these findings.

Pursuant to the agreement between railway labor and management, Congress authorized the railroads to recover their increased retirement tax obligations from higher *interstate freight* rates.[22] Interstate freight service was to bear the financial burden of the RR Amendments notwithstanding the fact that some of the increased costs were attributable to employees in intrastate passenger service.

[22] Agreement Between Railway Labor and Management Initialed March 7, 1973, reprinted as Appendix A to S. Rep. No. 93-202, 93d Cong., 1st Sess. 35 (1973).

See also S. Rep. No. 93-221, 93d Cong., 1st Sess. 5 (1973) ("[T]he bill . . . would provide for prompt freight rate increases to cover increases in expenses occasioned by higher railroad retirement taxes to the extent that such increases are justified."); S. Rep. No. 93-202, 93d Cong., 1st Sess. 4 (1973); H.R. Rep. No. 93-204, 93d Cong., 1st Sess. 7-8 (1973); and H.R. Rep. No. 93-319, 93d Cong., 1st Sess. 13 (1973) (The Conference Committee Report noted that the legislation "incorporates the provisions of the House bill with respect to increases in interstate freight rates . . . .").

Congress considered the extent to which *intrastate* rates should be increased to help offset the railroads' increased retirement tax costs. It rejected a House proposal that would have made interstate rate increases "concurrently effective" on intrastate rates.[23] Instead, Congress left the decisions concerning intrastate rate increases to railroad management and state regulatory authorities, subject to ICC review under stringent standards. The ICC was authorized to overturn the decisions of railroad managers and state officials regarding intrastate rates only when the ICC could find that the intrastate rate unreasonably discriminated in favor of intrastate commerce or that it unduly burdened interstate commerce.[24]

Such findings would be precluded in this case. The LIRR is not seeking to subsidize its intrastate passenger services by increasing interstate freight rates. It is undisputed that even with the surcharge, the LIRR's freight operations generate a deficit[25] that is subsidized by New York's taxpayers. Nor does the surcharge burden interstate commerce because shippers pay no more to ship to LIRR points than to other points in the New York City rate group.

The Court of Appeals also erred in holding that the ICC had failed to determine whether the LIRR's passenger fares could be increased to meet the increased railroad retirement taxes or whether its stockholder would bear the costs. The record reveals that the ICC considered passing the increased retirement tax costs on to intrastate

[23] H.R. Rep. No. 93-319, 93d Cong., 1st Sess. 12-14 (1973).

[24] 49 U.S.C.A. § 15a(6)(d)(C) (Supp. 1977), Pub. L. No. 93-69, § 201(4)(d)(C), 87 Stat. 167 (App. G).

[25] 350 I.C.C. at 711 (App. B 51b).

passenger service or to the LIRR stockholder, and that it correctly rejected those alternatives.

In disposing of the first alternative, the ICC found that recent requests for increased commuter fare increases based on inclusions of increased retirement costs had been denied. 350 I.C.C. at 714 (App. B 56b). More importantly, it found that the LIRR's passenger service "inevitably and inescapably could not bear its direct costs or its share of joint or indirect costs." 350 I.C.C. at 715 (App. B 57b). The ICC finding was supported by the following evidence:

(a) The LIRR had a total passenger operating deficit of approximately $108 million in 1974. 350 I.C.C. at 714 (App. B 56b).

(b) To the extent that the LIRR could obtain additional revenues from an intrastate passenger fare increase, the revenue "would be needed to combat that deficit." 350 I.C.C. at 714 (App. B 56b).

(c) The LIRR would have to double its passenger fares to make up its passenger revenue deficit.[26]

(d) Such a large passenger fare increase would cause a loss of ridership and would thus be "self-defeating." [27]

(e) The LIRR's freight operations would continue to operate at a deficit, even with the surcharge. 350 I.C.C. at 711 (App. B 52b).

Moreover, the ICC found that the other railroads had "not excluded the increased retirement taxes of their employees engaged in commuter or other passenger service" in computing the amount of their interstate freight rate increases. 350 I.C.C. at 714 (App. B 56b).

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[26] Testimony of Thomas P. Moore, Treasurer-Comptroller of the LIRR, before an ICC administrative law judge, February 10, 1975, Transcript of Hearings before the ICC, at 47.

[27] *Id.*; The LIRR's Verified Supplemental Petition, served November 6, 1974, at 4.

The Court of Appeals' second alternative—that the LIRR stockholder should bear the increased retirement tax burden—speaks more of irony than administrative deficiency. The LIRR's parent, the New York Metropolitan Transportation Authority, is able to meet the LIRR's operating deficits only because it receives financial assistance from federal, state and local governments. To accept the Court of Appeals' second alternative would be to shift payment of the increased retirement tax from railroad ratepayers to the public taxpayers who already subsidize the LIRR's freight operations.

In short, only a court determined to substitute its own judgment for the well-considered judgment of an expert administrative agency could have concluded that the ICC's report lacked "reasoned explanation." To hold otherwise would be "to deprive those words of any meaning." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, —— U.S. ——, 46 U.S.L.W. 4301, 4310 (U.S. April 3, 1978) (No. 76-419).

THE COURT OF APPEALS MISAPPLIED THE STATUTE GOVERNING DIVISIONS AND THEREBY CONTRAVENED THE ACT, THE TEACHINGS OF THIS COURT AND TRADITIONAL RATEMAKING PRINCIPLES.

In the alternative, the Court of Appeals held that the LIRR surcharge had the economic effect of altering the equal-factor basis of divisions of joint rates. Proceeding from this characterization, the Court held that the ICC had failed to make the findings required in *Baltimore & Ohio R.R. Co.* v. *Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87 (1968).

Certainly the proper allocation of revenues from joint haul freight service is within the ICC's administrative

expertise.[28] The role of courts in reviewing an ICC divisions determination is a limited one. This Court has confined the Court of Appeals' inquiry to a determination that the ICC acted in conformity with its statutory mandate.[29]

The ICC's mandate in this case permitted it to approve permanent rate increases that have the economic effect of altering the division of total transportation charges. To hold otherwise would deprive the ICC of the power to approve anything other than general rate increases, because only general rate increases exactly preserve the existing breakout among carriers of total transportation charges for hauls from a point on one line to a point on another. The legislative history, as well as the text, of the RR Amendments unequivocally establishes that the ICC had not only the power, but the obligation, to deviate from general increases to the extent necessary to preserve a fair rate structure or to prevent a windfall to any carrier.[30] For example, the Senate Commerce Committee cautioned the ICC that "[w]hile the present financial conditions of some carriers may justify 'pass through' of the expense increases, this may not be the case with all carriers." [31] And even in discussing general rate increases the Committee cautioned that they do not " 'preclude variability of application.' " [32]

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[28] *Chicago & North Western Ry. Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 326, 348 (1967).

[29] *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973).

[30] If every deviation from a general rate increase required a cumbersome divisions hearing, the ICC would not be able to discharge its obligations under the RR Amendments in the expedited manner directed by Congress.

[31] S. Rep. No. 93-221, 93d Cong., 1st Sess. 3 (1973).

[32] *Id., quoting*, Ex. Parte No. 281, Increased Freight Rates and Charges, 341 I.C.C. 288, 331 (1972).

Furthermore, the record refutes the Court of Appeals' conclusion that the ICC's findings on the divisions point were insufficient.[33] The ICC considered employing the usual divisions method to allow the LIRR to recoup its increased tax expenses and rejected it.[34] As the Court of Appeals itself recognized,[35] the ICC did not use the divisions method because it would have required at least a 37.5% increase in all joint freight rates involving the LIRR and would have granted a formidable windfall to other railroads. Certainly, the ICC adhered to its mandate in declining to approve such a windfall.

Stripped of its rhetoric, the "divisions" argument is that the southern and western railroads ought to be permitted to charge rates in excess of those needed to recover their retirement tax obligations and in excess of those allowed by the ICC, while the LIRR is deprived of the minimum rate increase necessary to recover its increased retirement tax obligations. It is an argument so inequitable and unjust that it should fail of its own weight.

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[33] In any event, the principle of divisions is technically inapplicable to the LIRR's proposed surcharge. The LIRR surcharge does not alter the amount of any joint rate or the percentage of that rate owing to any carrier serving LIRR points. Nor does the surcharge represent a separate charge for service that had been previously included in any joint rate. *Cf. Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973); *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954). Instead, the surcharge is a specific increase authorized by Congress to offset a specific retirement tax increase.

[34] Instead, the ICC conditioned the other railroads' right to the general rate increase they sought upon publication of tariffs incorporating the LIRR terminal surcharge on shipments to or from LIRR points. This Court has upheld the ICC's power to impose conditions on general rate increases. *United States* v. *Chesapeake & Ohio Ry Co.*, 426 U.S. 500 (1976).

[35] 565 F.2d at 332 (App. A 9a).

CONCLUSION

For the reasons stated above, the LIRR requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals vacating the ICC approval of the LIRR permanent terminal surcharge. In the alternative, the LIRR asks the Court to issue a writ of certiorari and summarily reverse the Court of Appeals' "trust fund" order so that the LIRR may continue to use the proceeds of its interim terminal surcharge until there is a final determination on the LIRR's permanent rate increase under the RR Amendments.

Respectfully submitted,

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April 24, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1515

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*,
Respondents.

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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April 24, 1978

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INDEX OF APPENDICES

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 77-1054

ABERDEEN & ROCKFISH RAILROAD COMPANY *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents.

Dec. 27, 1977

Before GOLDBERG, and HILL, Circuit Judges, and WYZANSKI, Senior District Judge.*

WYZANSKI, Senior District Judge:

This case comes before us upon the petition of Southern and Western railroads, invoking our alleged jurisdiction under 28 U.S.C. § 2342 to review and set aside an order dated November 23, 1976, served December 9, 1976, modifying an order dated August 15, 1975, served September 12, 1975, issued by the Interstate Commerce Commission [ICC] in its Docket Ex Parte 299 (Sub. No. 1) "*Increases in Freight Rates and Charges to Offset Retirement Tax Increases—1973.*" The ICC Report, setting forth the opinions and findings relevant to the August 15, 1975 order, has been published in 350 I.C.C. 673, 705-718 (1975).

Intervening as petitioners are Southeastern Association of Regulatory Utility Commissioners and Southern Governors' Conference.

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* Senior District Judge for the District of Massachusetts, sitting by designation.

Respondents are the United States and the Interstate Commerce Commission. Intervening as respondent is Long Island Rail Road Company [Long Island].

Stated broadly, the dominant issue in this case is whether, under Title II—Interstate Commerce Act Amendments, Act of July 10, 1973, 83 Stat. 162, 166-167, [which was originally codified as 49 U.S.C. § 15a(4), and is so referred to by the ICC, by the parties, and by us, but which the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210 has re-designated as 49 U.S.C. § 15a(6)], the ICC had authority, and if so whether its report sets forth an adequate basis for exercising its authority, to require the petitioning railroads to incorporate into all tariffs naming the rates applicable to total line-haul freight charges on shipments originating or terminating on the Long Island Rail Road a 12.5 percent surcharge which accrues solely to the Long Island, and which Long Island uses to recoup its increases in Railroad Retirement taxes, imposed by Title I—Railroad Retirement Act Amendments, Act of July 10, 1973, 87 Stat. 162.

We shall address ourselves, first, to a summary description of the 1973 statute which gave rise to the problem, then, to such facts about the Long Island as were disclosed in the administrative proceeding—and are virtually uncontested—next, to the findings and conclusions of the report adhered to by the majority of the Interstate Commerce Commissioners, and thereafter, to the contentions presented to us.

In 1973 Congress by Title I of the Act of July 10, 1973, 87 Stat. 162 increased the rate of contributions by railroads under the Railroad Retirement Act. This affected rates payable on account of railroad employees regardless of whether they themselves were employed in interstate commerce or in purely local activities. See 45 U.S.C. § 228a(b).

With the purpose of permitting the railroads, by pass-through procedures, to recoup the expenses thus incurred, the Congress, in Title II of the same Act of July 10, 1973, 87 Stat. 162, 166-167, in the following words authorized interim rates, provided for in paragraph 4(b) *infra*, and final rate determinations by the ICC, provided for in paragraph 4(c) *infra*:

> *Sec.* 201. Section 15a of the Interstate Commerce Act (49 U.S.C. 15a) is amended by adding at the end thereof the following new paragraph:
>
> "(4)(a) The Commission shall by rule, on or before August 1, 1973, establish requirements for petitions for adjustment of interstate rates of common carriers subject to this part based upon increases in expenses of such carriers resulting from any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such requirements, established pursuant to section 553 of title 5 of the United States Code (with time for comment limited so as to meet the required date for establishment and subject to future amendment or revocation), shall be designed to facilitate fair and expeditious action on any such petition as required in subparagraph (b) of this paragraph by disclosing such information as the amount needed in rate increases to offset such increases in expenses and the availability of means other than a rate increase by which the carrier might absorb or offset such increases in expenses.
>
> "(b) Notwithstanding any other provision of law, the Commission shall, within thirty days of the filing of a verified petition in accordance with rules promulgated under subparagraph (a) of this paragraph, by any carrier or group of carriers subject to this

part, permit the establishment of increases in the general level of the interstate rates of said carrier or carriers in an amount approximating that needed to offset increases in expenses theretofore experienced or demonstrably certain to occur commencing on or before the effective date of the increased rates, as a result of any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such increases in rates may be made effective on not more than thirty nor less than ten days' notice to the public, notwithstanding any outstanding orders of the Commission. To the extent necessary to effectuate their establishment, rates so increased shall be relieved from the provisions of section 4 of this part and may be published in tariff supplements of the kind ordinarily authorized in general increase proceedings.

"(c) The Commission shall within sixty days from the date of establishment of interim rates under paragraph (4)(b) of this section commence hearings for the purpose of making the final rate determination. The Commission shall then proceed to make such final rate determination with the carrier having the burden of proof. In making such determination, the Commission may take into account all factors appropriate to ratemaking generally under part I of this Act and shall determine such final rates under the standards and limitations applicable to ratemaking generally under part I of this Act. If the increases in rates finally authorized by the Commission are less than the increases in rates initially made effective, the carrier or carriers shall, subject to such tariff provisions as the Commission shall deem sufficient, make such refunds (in the amount by which the initially increased rate collected exceeds the final-

ly authorized increased rate) as may be ordered by the Commission, plus a reasonable rate of interest as determined by the Commission. Nothing contained in this paragraph shall limit or otherwise affect the authority of the Commission to authorize or to permit to become effective any increase in rates other than the increases herein specified."

The ICC in *Ex Parte* No. 298, *Requirements and Procedures Relating to Railroad Rate Adjustment Act of 1973* (49 C.F.R. § 1107) specified the information to be furnished by carriers utilizing the pass-through procedures.

The initial proceeding related to interim rates governed by Paragraph 4(b) above.

August 13, 1973 all railroads except the Long Island filed with the ICC a petition for permission to increase their interim freight rates by 2 percent effective October 1, 1973 and 2.7 percent effective January 1, 1974 to offset their increased retirement taxes. Included was an increase in the "joint rates" which cover the freight carried by two or more railroads participating in a joint haul. The proceeds of such a joint rate are divided in accordance with principles enunciated in *Class Rates Investigation*, 262 ICC 447 (1939), affirmed in *New York* v. *United States*, 331 U.S. 284, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947), whereby there is a uniform rate structure in the North, the South, and the West, east of the Rocky Mountains, and the Northern and the Southern railroads receive the same share of revenue for the same amount of service. That so-called "equal factor" basis of divisions governs unless the ICC specifically finds that a departure is justified by a difference in costs. *Baltimore & Ohio R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 89 S.Ct. 280, 21 L.Ed.2d 219 (1968).

August 24, 1973 Long Island, being opposed to increases in joint rates which would have reimbursed the Long Island for only a small fraction of its increases in retire-

ment taxes, filed a separate petition for permission to file a tariff providing for an interim terminal surcharge of 3.5 percent effective October 1, 1973, and 5.5 percent effective January 1, 1974.

The ICC, by Report and Order dated September 13, 1973, allowed the other railroads to increase their interim rates by 1.9 percent effective October 1, 1973, and 2.6 percent effective January 1, 1974, but denied the Long Island's petition for an interim terminal surcharge.

The Long Island sought review in the Eastern District of New York. A three-judge court held that paragraph 4(b) [49 U.S.C. § 15a(4)(b)], governing interim increases did not prohibit a terminal surcharge for purposes of "an interim rate increase," *Long Island R. R. Co.* v. *United States*, 388 F.Supp. 943, 946 (E.D.N.Y., 1974). The Court observed at p. 947 that "The sole inquiry at the interim stage was to be whether the proposed increase clearly exceeded the amount needed to cover increases in costs," and then the Court noted:

> "In holding that the LIRR's proposal of a terminal surcharge was an appropriate method of effecting an interim rate increase under section 15a(4)(b), we express no view with respect to its propriety as a final solution to the problem of recovering increased costs. This is properly the Commission's decision to make in the first instance in the hearings mandated by section 15a(4)(c). The latter provision on its face appears to contemplate the consideration of more factors than are appropriate under the interim measures of section 15a(4)(b)."

December 6, 1974 the ICC entered an order allowing, purely as an interim rate measure, Long Island to increase its terminal surcharge from 5.5 to 12.5 percent, effective December 19, 1974.

September 12, 1974 the ICC served its August 15, 1975 Report and Order addressing itself to the determination of final rates, pursuant to Paragraph 4(c) [49 U.S.C. § 15a(4)(c)].

With respect to railroads other than Long Island, the ICC determined to prescribe an increase of 2.8 percent in all interterritorial joint rates except those in which Long Island participated. So far as concerned joint rates in which Long Island participated, ICC determined to permit an add-on of a 12.5 percent terminal surcharge, as sought by Long Island.

The ICC on November 23, 1976 issued, and on December 9, 1976 served, an order (1) denying petitions for reconsideration of so much of its August 15, 1975 Report and Order as approved Long Island's 12.5 percent terminal surcharge, and (2) further requiring "the railroads . . . to incorporate the 12.5 percent terminal surcharge into all tariffs naming the rates from and to points on the Long Island Rail Road Company on or before September 12, 1977." It is that November 23, 1976 order which the Southern and Western railroads have petitioned us to set aside.

That order rests for its justification upon what is called a "Second Supplemental Report and Order of the Commission," decided August 15, 1975, from which two Commissioners dissented. The report recites the history of the Long Island's *interim* rates before and after *Long Island R. R.* v. *United States*, 388 F.Supp. 943 (E.D.N.Y., 1974), summarizes the arguments of the parties with respect to the *final* rates, gives a few facts about the Long Island's operations, its railroad retirement taxes, its revenues from the terminal surcharge, and its possible revenues from alternative sources, and distinguishes earlier rulings of the ICC which tend to challenge rather than to support Long Island's terminal surcharge. The report seeks to

differentiate this surcharge from changes in joint rates or divisions of them. After this non-Euclidean demonstration of *quod erat demonstrandum*, the report concludes that the ICC approves the Long Island's terminal charge and orders it to "be incorporated by the railroads into all tariffs naming joint rates from and to points on the Long Island Rail Road Company."

Insofar as we, after repeated readings, can understand the report, this is its reasoning.

> The ICC is not here determining the appropriate costs or cost level of any particular traffic. This is a proceeding in which the ICC is determining the amount of revenue needed to offset specific increased retirement taxes.
>
> Long Island's status as a carrier predominantly of passengers is unique. In 1972, while its total income was $94.3 million, only about $9.2 million was derived from freight service. In 1974 its total deficit was about $108 million, of which about $14.2 million was assignable to freight service.
>
> For the calendar year 1974 the Long Island paid additional railroad retirement taxes of $6,027,156. If the 12.5 percent terminal charge had been in effect for all of 1974 it would have yielded $5,995,008.
>
> For the calendar year 1975, the Long Island estimates that its additional railroad retirement taxes will be $6,253,595, while its 12.5 percent terminal charge will yield $6,066,494. Thus, even though all of the surcharge goes to the Long Island, it is just short of enabling the Long Island to recoup its payments on account of increased railroad retirement taxes.
>
> Other proposed methods of raising rates would have fallen far, far short of enabling Long Island to re-

> coup those taxes. If Long Island had joined the other railroads in the 2.8 percent general freight increase, Long Island, as a result of divisional arrangements, would have received only $269,000 additional, (or about 5 percent of its additional tax bill).
>
> If Long Island had sought recoupment by applying to the ICC for an increase in its divisional share of all line-haul rates to and from points on its lines, the percent payable to Long Island out of such rates [which had been 14 percent before, and became 16 percent after, April 13, 1973 (or about $1,400,000 annually)] would have required an increase of 37.5 percent,—a totally unrealistic proposal.

In considering the Long Island's terminal surcharge the ICC Report discusses, even if esoterically, at least five points which are related to "standards and limitations applicable to ratemaking generally under Part I" of the Interstate Commerce Act:

> (1) The surcharge does not cover any service, but is designed to cover expenses caused by the 1973 Railroad Retirement Act Amendments. This raises problems in connection with Rule 10 of Commission's Tariff Circular No. 29 which authorizes carriers to publish tariffs containing rates and charges for terminal services, but does not authorize the publication of charges where no service is performed. Hence if it is to allow the surcharge the Commission will have to give relief from its tariff publishing regulations. But this is not an insurmountable objection.
>
> (2) The surcharge is intended to reimburse Long Island for a single item of expense. It is generally not a sound and orderly ratemaking practice to isolate a single item from other operating expenses. However, this also is not an insurmountable objection.

(3) The surcharge, as made originally by the Long Island in its *interim* rates, was not plainly disclosed to a shipper or user of tariffs. The tariffs naming joint rates from and to points on the Long Island merely disclosed joint rates for a complete line-haul service to and from the named points, and did not show the surcharge. This was contrary to the intendment of Section 6 of the Interstate Commerce Act that a user of tariffs should be able to rely on what the tariffs plainly say. However, this can be cured in connection with final rates by requiring all railroads having joint rates with Long Island to show the terminal charge.

(4) The surcharge is designed to reimburse the Long Island not merely for retirement taxes attributable to employees engaged in interstate freight operations, but also for retirement taxes attributable to employees exclusively engaged in commuter passenger and like local services. Pre-World War I ICC opinions had held that, in general, each branch of railroad service should contribute its proper share of the cost of operation. But later ICC opinions ruled that that was not an inflexible rule and that if the ICC found in a particular case that the passenger service, inevitably and inescapably, could not bear its costs, then the ICC would allow the passenger deficit to be taken into account in adjustment of freight rates. In the present case, without making any detailed findings as to the policy of the 1973 recoupment statute, the amount of taxes attributable to the commuter service, the economic possibilities of passing the tax to passengers, and other matters relevant to the public interest, the ICC found and concluded that the question of how much of the tax burden should be borne by the freight shippers "is a question of managerial discretion more properly directed in the first instance to the MTA [Metropolitan Transit Authority], which operates the Long Island. . . . We [that is, the ICC] observe in passing that the L.I.R.R. passenger deficit for 1974 is estimated at $108 million. Presumably the revenue from a fare increase would be needed to combat that deficit." Just such managerial discretion had been exercised by the protesting railroads,—for they included in their increased freight rates the increased retirement taxes of their employees engaged in commuter or other passenger service as well as the increased retirement taxes of employees exclusively engaged in interstate freight operations.

(5) The surcharge benefits only the Long Island. It is not shared with those who are entitled to a division of the joint rates which the shipper pays. In the ICC's view, "the joint rates and division thereof are unchanged by the surcharge tariff. The surcharge is a separate add-on to the line-haul rates, the yield from which accrues solely to the LIRR." "It is a separate charge in its individual tariff, the revenue from which accrues to the LIRR to offset its increased retirement tax cost. While it affects the total freight charges, it does not change any joint rate."

Having dealt, more or less in the way we have just set forth, with the issues before it, the ICC (in both its order dated August 15, 1975 and in its order dated November 23, 1976) directed that the railroads, including petitioners here, "incorporate the 12.5 percent terminal surcharge into all tariffs naming the rates from and to points on the Long Island Rail Road Company. . . ."

Petitioners launch a broad attack on the November 23, 1976 order. Fundamentally, they challenge the proposition that Title II of the Act of July 10, 1973 authorized the Long Island to recoup through some *economically practical* method of *increasing rates* the entire amount of increased retirement taxes imposed by Title I of that Act.

Petitioners read Title II as with one hand giving to Long Island (and, of course, other railroads) the right of full recoupment, and with the other hand denying any recoupment which conflicts with "standards and limitations applicable to ratemaking generally." It is petitioners' position first, that it is contrary to the standards and limitations applicable to ratemaking (a) to allow a permanent terminal surcharge if there is no additional terminal service and (b) to allow a permanent terminal surcharge upon freight to recoup costs nine-tenths of which are due to local commuter passenger service; and second, that even if either allowance could be appropriate, in this matter the ICC has not given a reasoned explanation for departing from prior norms, and has acted arbitrarily.

We agree with the petitioners' contention that the ICC did not give a reasoned explanation of its November 23, 1976 order, and, therefore, we find it unnecessary to address ourselves to petitioners' other contentions.

Our starting point is Paragraph 4(c) added by Title II of the Act of July 10, 1973, [originally 49 U.S.C. § 15a (4), now 49 U.S.C. § 15a(6)]. With respect to petitions of carriers for adjustments of interstate rates based upon the expenses of carriers resulting from any increases in taxes under the Railroad Retirement Tax Act, Congress directed the ICC "to make such final rate determination. . . . In making such determination, the Commission . . . shall determine such final rates under the standards and limitations applicable to ratemaking generally under Part I" of the Interstate Commerce Act.

We cannot read the ICC's report as a reasoned compliance with that statutory mandate. Indeed the ICC's counsel in arguing this case at our bar admitted that the Commission had not made findings specifically responsive to that mandate.

Illustrative of the deficiencies in the ICC report is its statement that it was a matter for "managerial discretion" for the Long Island to allocate its increased railroad retirement costs, as it saw fit, between interstate freight service rates and intrastate passenger service rates.

As the ICC itself recognized, in ordinary circumstances allocation of costs is not a matter of managerial discretion. Under the standards and limitations applicable to ratemaking generally, each service is usually required to bear its own costs. To justify a departure there must be a reason. Of course, one valid reason might be a supervening statute such as the Act of July 10, 1973.

Unfortunately, the ICC's report does not in specific language explicitly interpret the Act. We are not unmindful that implicitly the ICC report seems to adopt the following construction of the statute: to wit, that when Congress imposed a tax measured by both wages paid to employees engaged in interstate freight services and to employees engaged in intrastate passenger services, and simultaneously authorized the taxpayer to reimburse itself, Congress contemplated that the management would exercise its discretion, subject to final determinations by the ICC under the standards and limitations applicable to ratemaking generally under the Interstate Commerce Act, to allocate reimbursement in accordance with economic feasibility, and in accordance with other rational factors.

If this was indeed the inarticulate major premise of the ICC, then we note that there are missing from the report of the ICC the findings of fact which are necessary to support the ICC in making its final determination to accept an exercise of managerial discretion which provides that *all* the increases in railroad retirement taxes shall be borne exclusively by increases in interstate freight rates. Thus, we do not know from the report whether the ICC found that economically it would not have been feasible to raise passenger rates to recover some or all of the increases in retirement taxes attributable to em-

ployees engaged exclusively in passenger service. Nor does the ICC address itself to the question whether if all or part of the new taxes attributable to passenger service are not borne by the freight rates but are left to be borne by the stockholder of the Long Island, that stockholder will allow the Long Island to go out of business as a carrier or as a carrier of interstate freight in order to avoid federal Railroad Retirement Act taxes.

Because of the inherent incompleteness of the ICC's report, which precludes us from having a basis to agree or disagree with its findings, or its interpretations of the statute governing it, and because of the ICC's failure to exercise a reasoned discretion, its order of November 23, 1976 must be set aside as not in compliance either with the Act of July 10, 1973 or with fundamental principles of due process in administrative proceedings. The Fifth Amendment to the United States Constitution requires that when it issues an order, an administrative agency must make findings and state conclusions which are susceptible of understanding by a court of the United States which is called upon to review that order. *Cf. Greater Boston Television Corp.* v. *FCC*, 143 U.S.App.D.C. 383, 392, 444 F.2d 841, 850 (1970). See *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The reviewing court must have in the record before it a reasoned analysis by the administrative agency based on its adequate findings supported by substantial evidence, and must have at least, by clear implication, the agency's construction of the statute it is applying, so that the court may be aided in its own construction of that law.

We have another ground for setting aside the December 9, 1976 order of the ICC. The Supreme Court, affirming a three-judge court in the Eastern District of Louisiana has made it clear that a departure from the equal-factor basis of divisions of joint rates can be allowed only on the

basis of specific findings. *Aberdeen & Rockfish R. Co.* v. *United States*, 270 F.Supp. 695 (E.D.La., 1967), affirmed *Baltimore & Ohio R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 89 S.Ct. 280, 21 L.Ed.2d 219 (1968). In the case at bar such findings were not made by the ICC because it reasoned that the Long Island's terminal surcharge was an "add-on" and not a modification of the joint rates. We reject this reasoning as being totally unrealistic.

We regard the present case as involving in economic terms a change in the joint rates and divisions thereof. It could not be doubted that if the Long Island added a terminal surcharge avowedly to increase its profits or to cover wage increases for all its employees, and the ICC ordered the other railroads to collect from shippers such amounts as well as joint rates this would constitute an undermining of the principle of both joint rates and equal division of joint rates. We see no difference when the add-on is to recoup tax payments. In all such cases there must be justifying findings for disturbing the rate structure. Of course, an adequate justification may or may not be in the recoupment purpose of the Act of July 10, 1973. As to that point we have already observed that the ICC has not yet appropriately spoken, and so we need not express our opinion.

Inasmuch as petitioners seek to set aside the ICC's order on the ground that it disturbs the rate structure contrary to the principle of division of joint rates the petitioners are correct in maintaining that this court has jurisdiction of this case under 28 U.S.C. § 2342. *Baltimore & Ohio R.* v. *Aberdeen & Rockfish R. Co., supra.*

There remains the question as to how shippers should be charged during the period that this matter is still under consideration by the ICC, to which we must remand this case for further proceedings not inconsistent with our opinion. It seems to us equitable to restore the interim

rates pending a determination of the final rates, but to direct that the Long Island keep in a separate trust fund, subject to ultimate determination by the ICC, all sums hereafter received as a consequence of the 12.5 percent interim terminal surcharge.

The Interstate Commerce Commission order of November 23, 1973 is set aside. Case remanded to the Interstate Commerce Commission for further proceedings in conformity with this opinion. Pending determination of final rates by the Interstate Commerce Commission in this matter, the railroads which were subject to the order here set aside are required to incorporate the 12.5 percent terminal surcharge, as an interim charge, into all tariffs naming the rates from and to points on the Long Island Rail Road Company, and the said Long Island Rail Road Company is required to keep in a separate trust fund the proceeds of the said interim 12.5 percent terminal surcharge subject to further just and equitable orders of the Interstate Commerce Commission.

REMANDED.

APPENDIX B

APPENDIX B

Served September 12, 1975

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 299 [1]

INCREASES IN FREIGHT RATES AND CHARGES TO OFFSET RETIREMENT TAX INCREASES—1973

Decided August 15, 1975

Sought increases in freight rates and charges found necessary, in part, to enable respondents in both proceedings to offset increases in retirement taxes. Proceedings discontinued.

Appearances as shown in prior report and *Samuel L. Freeman*, and *John J. Paylor* for respondents in Ex Parte No. 299.

Duane A. Bartsch, Michael B. Crutcher, John F. Donelan, H. E. Franklin, Jr., William A. Gray, Howard Gould, Jon C. Hansen, J. C. Harper, James M. Kefauver, John K. Maser, III, Allan I. Mendelsohn, David Reichert, L. I. Reynolds, Emanuel Rouvelas, Stephen D. Strauss, Joseph

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[1] This report embraces Ex Parte No. 299 (Sub-No. 1), Increases in Freight Rates and Charges of the Long Island Rail Road Company to Offset Retirement Tax Increases—1973.

S. Wager, Henry M. Wick, Jr., and *W. Randall Tye* for protestants in Ex Parte No. 299.

Michael B. Crutcher, Carl E. Sanders, Norman L. Underwood, and *David O. Benson* for Southern Governors' Conference and Southeastern Association of Regulatory Utility Commissioners, intervenors.

Harry N. Babcock, John J. Burchell, Joseph M. O'Malley, Richard J. Murphy, L. I. Reynolds, Emanuel Rouvelas, Albert B. Russ, Jr., James L. Tapley, and *Donald M. Tolmie* for protestants in Ex Parte No. 299 (Sub-No. 1).

SECOND SUPPLEMENTAL REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

These proceedings, which are before us on further investigation, concern actions taken by the nation's railroads pursuant to the provisions of Public Law 93-69, 93d Congress, H. R. 7200, enacted July 10, 1973. This statute is an amendment to the Railroad Retirement Act and a companion amendment to the Interstate Commerce Act. The amendment to the Railroad Retirement Act imposed increased tax liabilities on the railroads, shifting some of the tax liability from the railroad employees to the railroad employers. As a companion to that action, the Interstate Commerce Act was amended to provide for the prompt pass-through of the increased tax liability by means of increases in the general rate level. The amendment to the Interstate Commerce Act, termed the Railroad Rate Adjustment Act of 1973, is set forth in Title II of Public Law 93-69, an amendment to section 15a (see appendix A). In Ex Parte No. 298, Requirements and Procedures Relating to Railroad Rate Adjustment Act of 1973 (49 CFR 1107), the Commission specified the data and information which the carriers must furnish in these

proceedings, (see appendix B). This report concerns the final rate determination arising under the amended section 15a.

The new procedures provide expedited means for a carrier or group of carriers to establish an increase in the general level of interstate rates to offset increases in the retirement taxes of railroad employees under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. The increases proposed by the nation's railroads, except the Long Island Rail Road Company (Long Island or LIRR),[2] in rates and charges, including lighterage and protective service, were 2 percent, effective October 1, 1973, and 2.7 percent, effective January 1, 1974, in lieu of the 2 percent, subject in both instances to the following exceptions (1) of charges and allowances for services normally excluded in seeking general increases; (2) of certain line-haul rates, generally unit-train and annual volume rates, and certain charges for services, like handling and storage on specific commodities or movements, which are set forth in items 150, 160, 170, and 180 of the proposed tariff.

In the report decided September 13, 1973, herein called the prior or interim report, the Commission permitted the nation's railroads, except the Long Island, to establish increases in their freight rates and charges of 1.9 percent, effective October 1, 1973, and 2.6 percent, effective January 1, 1974, in lieu of the 1.9 percent, subject to a refund rule in the event the final rate determination should authorize increases of lesser amounts. These increases are to offset increases in retirement taxes due to an increase in the tax rate, which rose from 10.6

[2] The increases proposed by the Long Island are treated subsequently in this report.

to 15.35 percent on October 1, 1973, and to an increase in the maximum monthly compensation per employee subject to retirement taxes from $900 to $1,050 on January 1, 1974. By petition filed January 31, 1974, the railroads, except the Long Island, sought an additional increase of 0.3 percent or a total of 2.9 percent in lieu of the 2.6 percent to offset the hitherto unscheduled increase from $1,050 to $1,100 in the maximum monthly figure. In a supplemental report and order decided February 28, 1974, the Commission approved an added increase of 0.2 percent or a total increase of 2.8 percent.

In the interim report, respondents were ordered to submit at the hearing (a) any productivity gains experienced in the third quarter of 1973, and the effect on 1974 projections, including evidence to substantiate those projections; (b) an explanation of why the excepted rates and charges shall not be increased without awaiting renewal of individual arrangements, and of the amount of the additional revenue which would be obtained therefrom; and (c) a plan to correct the variations among individual railroads in the amount of increased retirement taxes offset by the additional revenues as shown in the prior report.

The consolidated hearing began on November 26, 1973, in Washington, D.C., in both the title and the subnumbered proceedings. Verified statements were filed, and hearing for the purpose of cross-examination was held on January 8, 1974. Pursuant to a Commission order of January 7, 1975, as modified by its order of January 24, 1975, the respondent railroads in the title proceeding submitted on March 14, 1975, evidence reflecting their actual increased retirement taxes and their additional revenues obtained from the interim rate increases granted in this proceeding up to and including December 31, 1974. An additional hearing in the subnumbered proceeding was held on February 10, 1975, at which the

Long Island presented evidence of its actual increased taxes and revenues. At these hearings, appearances were entered on behalf of various protestants and intervenors, whose positions and evidence are later discussed. Briefs have been filed by the parties. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

Tax/Revenue Variations

As noted, the interim report required the carriers to submit a plan to correct the inequities whereby certain carriers would recover more revenues from the rate increase than the increased retirement tax expenses, while for other carriers, the revenue yield would be less than the pension cost. That report recognized that, "Unavoidably, in applying a uniform percentage increase, there will be a variation among the individual railroads in the amount of the increased retirement taxes offset by the additional revenues." Only Penn Central presented such a plan. The majority of the carriers oppose it. In essence, what the Penn Central suggests is a procedure under which the revenues earned by each road in excess of the additional retirement taxes incurred by such railroad would be transferred to a clearing house under Association of American Railroads (AAR) jurisdiction. This excess would then be distributed to the "underprovided" railroads whose tax burden exceeded the increased revenue provided from the Ex Parte No. 299 increase. A summary of the evidence presented both for and against the plan is contained in appendix C.

Discussion.—The tax/revenue variations among carriers are, of course, the mathematical result of the differences between railroads in their ratios of taxable payroll to freight revenues. The question is whether it is feasible, lawful, and warranted in this proceeding dealing

with a rate increase estimated to yield about $399.2 million annually to require the transfusion of the relatively small portion of that amount in overprovided funds to shortfall carriers. Without passing on the legal or other arguments offered against the proposed plan or any other plan, in this particular case, we believe the answer is no. The amount of money that would be distributed under the Penn Central plan is small when compared to the problems which may result from such a plan. Actually, only the southern railroads had more additional revenue than increased retirement taxes in 1974, and this excess was only $2.2 million.

Certain problems would be inherent in any pooling arrangement. For example, the increase authorized herein must of necessity be permissive. See *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370. Several railroads, including among others the Chessie System and the Norfolk and Western, have indicated that they would reduce their rates to the extent necessary to eliminate all excess funds. This type of approach could reduce the pool significantly so that all railroads would not be able to recover their increases. The proposed plan, while having the appearance of workability, does give rise to questions concerning collection of excess funds and the proposed method of their distribution. This would be especially so if there is a significant shortfall of funds to distribute. We could very likely be faced with another proceeding to pass upon further increases because of deficiencies in the pool.

The legislation under consideration here directs the Commission to "determine such final rates under the standards and limitations applicable to ratemaking generally" under part I of Interstate Commerce Act. In past rail general increase proceedings the Commission, in evaluating carrier proposals for percentage increases, has viewed the railroad industry as an interdependent

system and, accordingly, has not stressed the needs of individual lines but has "considered the needs of the carriers as a whole or at least by major territorial groupings." See Ex Parte No. 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 309 (1972). We see no reason to change that approach here.

We realize there will be differences in the amounts needed and collected by individual railroads under a straight across the board increase. However, while we would like to see the railroads voluntarily agree to work this problem out themselves, and suggested this in our prior report, we do not believe implementing the Penn Central plan, or any similar plan, would be feasible at this time.

Conclusion.—We conclude that no plan for collecting and disbursing of funds should be implemented at this time.

Computation of Amounts of Increased Expenses and Increased Rates

In the interim report, the Commission determined that from October 1, 1973, to December 31, 1973, the increased expenses due to the increased retirement tax would total $65,757,241 or $775,947 less than the yield from a rate increase of 1.9 percent amounting to $66,533,-188. For calendar year 1974, the 2.6-percent rate increase was estimated to yield $362,367,265 or $610,621 more than the increased pension costs of $361,757,265.

The carriers later made revisions in their estimates of tax and revenue increases (1) to adjust for only half of the carriers correctly deducting the reimbursements by Amtrak and other public authorities; (2) to correct for the failure of some carriers to consider a wage increase effective January 1, 1974, and likewise, a tax increase; (3) to reflect the estimates of revenue from including the increase on the expected unit train and volume rates, and

(4) to incorporate a necessary reduction from 4.7 to 4.2 percent in the tax on compensation indirectly incurred or absorbed by the carriers.

In revising their payroll tax estimates to reflect the increase in the maximum taxable base to $1,100 per month, the carriers estimated the increased taxes at $65,-424,000, and that a 1.9-percent rate increase would be needed in the fourth quarter of 1973. For calendar year 1974, the tax increases is computed at $398.9 million, which the carriers estimate would require a 2.9-percent rate increase. The supplemental report and order decided February 28, 1974, noted that the carriers had underestimated their total traffic for 1973 by 6.1 billion ton-miles. We then recomputed the 1974 revenues based on preliminary data for 1973 with traffic of 846.7 billion ton-miles and revenue per ton-mile of 1.67 cents (based on the rate level as of August 19, 1973, which included the increases approved in Ex Parte No. 295, but excludes those at issue in Ex Parte Nos. 299 and 303). We concluded that on the basis of the increased traffic, the authorized interim increase of 2.6 percent would yield $367 million or about $4.6 million more than estimated. However, to offset the $398.9 million in increased taxes, we estimated a 2.8 percent rate increase would be required, and that amount was authorized.

Data showing the actual tax increases experienced, as well as the additional freight revenues collected, during the fourth calendar quarter of 1973 are contained in the railroads' statement filed April 1, 1974, and in their additional evidence submitted on March 14, 1975, pursuant to a Commission order of January 7, 1975, as modified by its order of January 24, 1975. Data for the Central Railroad Company of New Jersey was not included with this latest evidence, and this omission probably explains why the latest statistics are slightly lower than those furnished on April 1, 1974, although it can not account for the higher ton-mile figure shown in this latest submis-

sion. However, since the percentage differences are so small as to be insignificant, with the largest being only 0.49 percent, we will use the March 14, 1975, data to evaluate the need for the 1.9-percent increase and note that it is understated to the extent that the Central of New Jersey is omitted.

During the fourth calendar quarter of 1973, these railroads employed an average of 511,156 persons, which was higher than the estimated level of 509,744. These employees worked 315,371,010 service hours and were paid $1,762,622,000, which is approximately 1.1 percent higher than anticipated. As a result of these higher levels of employment and compensation, these railroads incurred additional retirement taxes of $64.9 million. Freight revenue per ton-mile, at the Ex Parte No. 295 revenue level and excluding the effect of the 1.9-percent interim increase, was 1.627 cents, a decline from the expected level. However, total revenue ton-miles were 218,880,000 more than 3 percent higher than the original figure. When the lower freight revenue per ton-mile of 1.627 cents and the higher level of 218,880,000 revenue ton-miles are considered, an increase of 1.82 percent was required to meet the increased retirement taxes for the fourth calendar quarter of 1973. The actual additional revenue from the 1.9-percent interim freight rate increase was $63.1 million, indicating an effective increase of only 1.77 percent and failing to cover the total tax increase by $1.8 million. The results on a nationwide and regional basis are shown in the following table:

TABLE 1

Comparison of Retirement Tax Increases incurred with freight revenues received from the 1.9-percent interim increase for 4th quarter-1973

	U.S.	East	South	West
		(000)		
1. Tax increases incurred	$64,944	$23,331	$10,406	$31,208
2. Revenues Received	63,155	21,119	10,400	31,635
3. Net difference	(1,789)	(2,212)	(6)	427

For calendar year 1974, the respondents estimated in their April 1, 1974 statement that a 2.8-percent rate increase was required. They referred to data showing that rail employment in January and February, 1974 was up 0.98 percent over the corresponding months of 1973. Since they had originally predicted a decline of 0.52 percent in the number of employees, the railroads calculated that the 1974 rail employment level would be 1.51 percent higher than first computed and increased their estimated tax increase by that same percentage from $398.9 million to $404.9 million. The railroads also cited preliminary traffic statistics which pointed to a 1974 revenue ton-mile total of 872 billion ton-miles, 3.55 percent or 31.4 billion ton-miles more than anticipated. By multiplying this new 1974 ton-mile figure, 872 billion ton-miles, by the freight revenue per ton-mile at the Ex Parte No. 295 level, computed as 1.635 cents during the fourth quarter of 1973 by the railroads, they produced a revenue base of $14,257 million. It was calculated that a rate increase of 2.8 percent was necessary to produce $404.9 million in extra revenue.

The actual 1974 data submitted on March 14, 1975 shows that these railroads incurred additional retirement taxes of $384.1 million, approximately $14.8 million less than estimated in our supplemental report and $20.8 million less than the railroads predicted in their April 1, 1974 statement. These differences partially result from the omission of data from the Central Railroad Company of New Jersey and greater reimbursements by Amtrak and others than foreseen. These railroads received only $377.8 million from the interim increases, resulting in a shortfall of $6.3 million. However, as shown in the following table, only the eastern and western railroads failed to recover all their retirement tax increases while the southern railroads' revenues from the interim increases exceeded their additional taxes.

TABLE 2

Comparison of Retirement Tax increases incurred with revenues received for the year, 1974

	U.S.	East	South	West
		000		
1. Tax increases incurred	$384,148	$137,220	$63,536	$183,392
2. Revenues received	377,804	129,349	65,751	182,703
3. Net difference	(6,344)	(7,871)	2,215	(689)

CONCLUSION

We have compared the data submitted by the railroads on March 14, 1975, with 1973 and 1974 wage and quarterly commodity statistics as reported by each Class I railroad. Based on these comparisons, the data is accurate.

For the fourth calendar quarter of 1973, we have developed the percentage rate increase at the Ex Parte No. 295 revenue and fourth quarter of 1973 traffic levels that the railroads would have needed to recover the actual tax increases incurred.

TABLE 3

Percentage increase in freight rates need at the X-295-A revenue level to recover actual fourth quarter 1973 increases in retirement taxes

	U.S.	East	South	West
1. Tax increases incurred (000)	$64,944	$23,331	$10,406	$31,208
2. 4th quarter 1973-revenue ton-miles (000)	218,880,136	62,590,533	40,413,911	115,875,692
3. X-295-A revenue per ton-mile	1.627	1.875	1.549	1.520
4 Freight revenues (line 2 x line 3) (000)	$3,561,179	$1,178,572	$626,011	$1,761,311
5. Percentage increases needed to recover increased taxes (line 1 ÷ line 4) (percent)	1.82	1.99	1.66	1.77
6. Actual percentages of increased revenue (percent)	1.77	1.80	1.66	1.80

The evidence shows that only the western railroads collected more from the 1.9-percent interim increase than was paid in additional retirement taxes. However, as shown above, this excess was only $427,000 and, in our

opinion, is not so substantial that its refund is required. We conclude that the 1.9-percent interim freight rate increase previously granted in this proceeding for the fourth calendar quarter of 1973 was fully justified by the retirement tax increases incurred by the railroads.

For the year 1974, these railroads experienced additional retirement taxes of $384.1 million but received additional revenues of only $377.8 million from the 2.6 percent interim rate increase, which became 2.8 percent effective March 16, 1974. The result was a shortfall of $6.3 million for these railroads. However, the latest evidence submitted in this proceeding shows that this shortfall was experienced mainly by eastern railroads and partially by western railroads. The southern railroads collected $2,215,000 more in revenues from these interim increases than they paid in additional retirement taxes. In the following table are shown the percentage rate increases that the railroads would have needed to offset the actual increased retirement taxes, based on Ex Parte No. 295 revenue and actual 1974 traffic level.

TABLE 4

Percentage increase in freight rates needed at the X-295-A revenue level to recover actual 1974 increases in retirement taxes

	U.S.	East	South	West
1. Tax increases incurred (000)	384,148	137,220	63,536	183,392
2. 1974 revenue ton-miles (000)	854,619,343	247,980,325	160,798,144	445,840,874
3. X-295-A revenue per ton-miles cents	1.627	1.875	1.549	1.520
4. Freight revenue (line 2 x line 3) (000)	13,904,657	4,649,631	2,490,763	6,776,781
5. Percentage increase need to recover increased taxes (line 1 ÷ line 4) percent	2.76	2.95	2.55	2.71
6. Actual percentages of increased revenue percent	2.72	2.78	2.64	2.70

Since the 2.8-percent interim increase was in effect from March 16, 1974, the actual percentage increases for the last nine and one-half months of 1974 must have been higher than those stated above.

From the above data, we find that the authorized 2.8-percent rate increase is justified for the eastern and western railroads. However, the data does not show that the southern railroads needed such an increase. To recover their increased retirement taxes, the southern railroads needed a rate increase of only 2.55 percent at the Ex Parte No. 295 revenue level, and only an increase at that level is authorized for southern intraterritorial traffic.

Accordingly, respondents operating in southern territory should take steps immediately to reduce the rates applicable on southern intraterritorial traffic, other than export and import traffic, from 2.8 percent to 2.55 percent at the Ex Parte No. 295 level. Once this change is made by tariff supplement, on not less than 15 days' notice, carriers should commence to make refunds as provided for in their tariffs with interest at the rate of 4 percent per annum in accordance with the requirements promulgated in Ex Parte No. 298. Respondents are hereby advised that compliance concerning the refund of revenues are to be made in full no later than 90 days from date of service of this report.

Excepted Unit-Train, Volume and other Rates.—In the interim report, we required respondents to indicate (1) why the excepted rates could not be increased without awaiting renewal of individual contractual arrangements, and (2) the amount of additional revenue which would be derived therefrom. The Boards of Trade of Kansas City, Mo., and of the City of Chicago, object to the exclusion of certain unit-train and annual volume rates from the sought increases, urging that since the increased railroad retirement taxes apply to all railroad employees, all types of traffic should bear their share of the increase.

Respondents assumed a rate increase on the unit-train and other excepted traffic of 2 percent effective October 1,

1973, and 2.5 percent effective January 1, 1974, in lieu of the 2 percent. The revenue from this traffic would be \$469,734 for the 4th quarter of 1973, \$2,437,880 for the year 1974, and somewhat higher under presently authorized increases.

Respondents contend that the increases should not be applied to the excepted rates until the time agreed upon between the carriers, shippers and receivers involved in each particular unit-train or other volume movement. Such transportation usually involves long-term arrangements where cost stability is essential. The rates and charges for volume movements or for services in connection therewith, are at levels established to reflect characteristics inherent in such movements or services. They are generally adjusted periodically or on a given date in accordance with the carrier's cost experience or cost indices, which reflect increases not only in the cost of labor, but also materials and supplies. In the past, the increases in volume rates have approximated the increases authorized in general revenue proceedings. Respondents are opposed to increasing these volume and other excepted rates in a general revenue proceeding because this method (1) has not, and would not afford any assurance for recovering increased costs incurred in specific movements; and (2) varies in timing and inhibits shippers and receivers from anticipating the effect of such costs with the degree of certainty essential in planning future capital requirements. In addition, respondents urge (1) that adjusting the charges pursuant to the contract removes the question from costly regulatory proceedings; (2) that cost adjustments are effected on both interstate and intrastate rates and charges, simultaneously eliminating any lag as between interstate and intrastate rates; and (3) that the tariff publication is enhanced since the rates and charges are recomputed and republished to include the cost increases in the new levels

of rates without the necessity of referring to blanket supplements or surcharge publications.

Conclusion.—It is evident that the parties to the excepted rates have a mutually satisfactory method for recovering cost increases related to these special movements. This, of course, does not end our inquiry. Out [*sic*] investigation indicates that this unit-train and other excepted traffic does not escape higher payroll tax expenses, but rather incurs such costs through known rate increases imposed at a different time. There is also another aspect to be considered. The choice between nuclear and fossil fuel for new generating capacity has long-term ramifications. Contracts with escalation clauses have become a part of the coal companies' efforts to keep their product competitive. Unit-train transportation and pricing were developed to help coal compete, thereby keeping the utilities as rail customers. Extension of the escalation agreements to rail rates is quite logical. Under such agreements, the matter is then a closely examined cost matter to take care of each and every cost push on any item of expense that is at all attributable to the unit-train movement, rather than encompassed in a general revenue proceeding, the nature of which generally precludes the determination of costs of individual movements. Thus, it is found that respondents have provided a satisfactory explanation for excepting the rates in items 150, 160, 170 and 180 of the tariff from the increase. However, when filing a petition in a similar proceeding in the future, the carriers must show when and by what amounts these excepted rates have actually been subjected to cost increases, to insure that such rates are bearing an appropriate portion of this cost item.

Productivity Gains

Section 15(a)(4)(a) of the act requires disclosure of the availability of means other than a rate increase by

which respondents might absorb or offset increases in retirement tax expenses. In the interim report, the Commission noted respondents' position that use of productivity gains to offset increased costs would be appropriate only in a situation of an industry earning a fair return. The Commission required respondents submit for the record any productivity gains experienced in the third quarter of 1973 and the effect on 1974 projections, including evidence to substantiate those projections. Ton-miles per service-hour and per dollar of employee compensation have been regarded as measures of productivity. Respondents presented the following table:

TABLE 5

Employee-hours, compensation and revenue ton-miles

CLASS I RAILROAD[1] 3D QUARTER 1972 TO 4TH QUARTER 1974 ESTIMATED

Quarter	Service hours	Compensation	Revenue ton-miles	Compensation per hour	Ton-miles	
					Per service hour	Per $ of compensation
	1	2	3	5[*sic*]	5	6
	Millions	*Millions*	*Millions*			
Third 1972	320.6	$1,608.3	190,655	$5.00	595	119
Fourth 1972	315.0	1,649.6	202,037	5.24	641	122
First 1973	308.3	1,656.2	204,996	5.37	665	124
Second 1973	318.4	1,764.8	217,683	5.54	684	123
Estimated						
Third 1973	316.6	1,763.1	206,088	5.57	651	117
Fourth 1973	313.3	1,745.8	211,805	5.57	676	121
First 1974	306.3	1,779.2	204,897	5.81	669	115
Second 1974	315.0	1,826.4	217,256	5.80	690	119
Third 1974	317.3	1,844.4	207,151	5.81	653	112
Fourth 1974	312.8	1,816.8	212,694	5.81	680	117

[1] Excludes Long Island, NRPC, and Auto-Train.

Respondents point out that ton-miles per service-hour declined from 684 in the second quarter of 1973 to an estimated 651 in the third quarter of 1973 and were estimated to rise to 690 in the second quarter of 1974, then fall to 653 in the third quarter and rise to 680 in the fourth quarter of 1974.

Using the actual data submitted by the respondents, we have prepared the following table. It is to be noted that data for the Central Railroad of New Jersey is not included.

TABLE 6

Employee-hours, compensation and revenue ton-miles

CLASS I RAILROADS [1]

Quarter	Service hours	Compensation	Revenue ton-miles	Compensation per hour	Ton-miles	
					Per service hour	Per $ of compensation
	1	2	3	4	5	6
	Millions	*Millions*	*Millions*			
Fourth 1973	315.4	$1,762.6	218,880	$5.59	694	124
First 1974	310.1	1,769.2	216,865	5.71	699	123
Second 1974	314.5	1,818.3	222,961	5.78	709	123
Third 1974	322.3	1,876.5	210.683	5.82	654	112
Fourth 1974	315.3	1,845.1	204.110	5.85	647	111

[1] Excludes Long Island, NRPC, Auto-Train and Central Railroad of New Jersey.

When compared with the estimates originally submitted by the railroads, the actual data shows that ton-miles per service-hour and per dollar of employee compensation were higher for the fourth quarter of 1973 through the second quarter of 1974, approximately the same for the third quarter of 1974, and lower for the fourth quarter of 1974.

Respondents contend (1) that while estimated ton-miles per employee-hour are shown to be higher in the third and fourth quarters of 1973 than in the corresponding quarters of 1972, such increases have been more than offset by increased wages—thus ton-miles per dollar of wages are shown as declining and further declines are shown for the third and fourth quarters of 1974; (2) that even without attempting to measure the contribution of capital in the productivity equation, these figures serve to further emphasize that productivity gains have already been more than offset by cost increases and cannot be regarded as available again to offset part of the payroll tax increase; (3) that to the extent productivity has been

achieved due to greater traffic volume, capital expenditure, improved efficiency or belt tightening, it has already been consumed, and more, by massive increases in payroll cost levels; (4) that cost escalations to which the railroads have been subjected since 1970 amount to more than $2.2 billion annually, while rate increases authorized since Ex Parte 265-267 would produce less than $900 million annually even if fully applied; (5) that more than $1 billion of the cost increases over rate increases have been absorbed or offset by means other than rate increases; (6) that net earnings are at a low and inadequate level with nothing to help meet the cost of further payroll tax increases; (7) that any net revenues which can be realized from traffic growth or efficiency gains are needed as a basis for capital investment programs; (8) that in the face of widely recognized need for greatly increased spending, the record shows that capital outlays at the inadequate levels of past years and currently, have substantially exceeded available funds generated internally, resulting in near-exhaustion of working capital, increased borrowing at high interest rates and increasing resort to leasing; (9) that even if there existed productivity gains which were not consumed by other increased costs—which is not the case—their use to offset added retirement tax expenses would be appropriate only if earnings were fair, reasonable and adequate; (10) that rates of return for the year ending March 31, 1973, of 0.6 percent in the East, 5.2 percent in the South, 4.4 percent in the West and 3.1 percent for the United States are not significantly different from 1951's admittedly substandard and inadequate rates of return of 3.7 percent in the East, 5.0 percent in the South, 4.4 percent in the West and 4.2 percent for the United States, yet the cost of borrowed money has nearly tripled; (11) that railroad earnings are far below those of other industries with which railroads must compete for investment capital; and (12) that no conceivable logic would suggest that railroads in

such circumstances should regard any attainable increase in productivity as being available to offset or absorb a cost increase when such gains are so desperately needed to effect an increase in net earnings.

The Fertilizer Institute contends (1) that the inclusion of the subject increase in the rate base will, through the compounding effect of future increases, ultimately result in substantially greater revenues than that actually needed by the carriers to offset tax increases, which may legitimately be reimbursed; (2) that respondents have not adjusted downward the projected tax liability in line with the predictable reduction in the work force, which since 1969, has been decreasing at a rate in excess of 2 percent a year; (3) that there has been a 7-percent gain per year from 1961 to 1971 in the number of ton-miles per employee; (4) that respondents have failed to explain why such gains should not be allocated to these increased retirement tax expenses rather than other expenses as alleged by the carriers; (5) that the Commission should eliminate the "overpayments" which will result from the predictable employee attrition, increased productivity and the compounding effect of future increases, by periodically adjusting the percentage of any increase authorized pursuant to this proceeding.

Conclusions.—The fluctuation in revenue ton-miles per dollar of compensation is caused by such factors as inflationary pressures and the reduction in the railroad's share of intercity freight traffic. This reduction is due in part to a diversion of traffic to other modes as a result of a deterioration in rail service and shifts in regional production. If the railroads maintained their share of the traffic ton-miles and freight revenue would, of course, have been much higher. Because the rail industry is characterized by under-utilization, wage costs would not have increased proportionally and revenues per dollar of compensation would obviously have been greater. There-

fore, the decrease in ton-miles per dollar of compensation cannot be ascribed only to wage increases as the railroads contend. While the continuing decline in employment has been reversed and 1974 traffic has exceeded expectations, respondents have been faced with increased expenses in this period of rapid inflation and the rate increases authorized together with recently increased traffic volume have not generated sufficient revenues.

Thus, the record does not warrant the conclusion that there are means available other than a rate increase by which the carriers might absorb or offset the increases in retirement tax expenses. The subject increase will be included in the rate base in its chronological sequence to other proposed general rate increases (i.e., after Ex Parte No. 295 and before Ex Parte No. 303). Any compounding of it by later general increases will, of course, be considered in evaluating the railroads' revenue needs for future rate increases so that no windfall will result.

Bituminous Coal.—Protestants, Carolina Power and Light Co., Duke Power Co., South Carolina Electric and Gas Co., and Virginia Electric and Power Co., are electric utility companies engaged in the business of producing, distributing and selling electrical energy in North Carolina, South Carolina and Virginia. In 1972, they consumed almost 25 million tons of bituminous coal, which were transported by railroads at freight charges which totaled more than $91 million. A 2.6-percent increase in the rates on coal would add over $2 million to the annual freight charges paid by these companies.

The coal originates at mines in West Virginia, Virginia, Kentucky and Tennessee and is transported by the Chesapeake and Ohio Railway Company, Carolina, Clinchfield and Ohio Railway, Louisville and Nashville Railroad Company, Norfolk and Western Railway Company, Seaboard Coastline Railroad Company and Southern Railway Company to protestants' power plants in Virginia and the Carolinas.

Protestants contend (1) that these six railroads have consistently achieved much higher system earnings relatively than those shown for all railroads in the United States or in the various districts; (2) that in 1972, the combined net railway operating income for these six carriers comprised 43 percent of the total for all U.S. railroads and 119 percent of the total for all southern and eastern district railroads; (3) (a) that these earnings were achieved on a relatively small portion of the traffic volume; (b) that gross ton-miles operated by the six carriers in 1972 accounted for only 21 percent of the U.S. total, whereas, net railway operating income comprised 43 percent of the U.S. total; and (c) that the pattern of increased earnings continued in 1973; (4) that the sound financial condition of the six railroads is aided considerably by the substantial amount of revenue contribution derived by these carriers from movements of coal to protestants' plants; (5) that in addition, the ability of these carriers to offset cost increases is due in no small part to the efficient nature of the utility coal movements; (6) that cost studies covering rail movements of coal to protestants' plants over a period of years demonstrate that earnings of the coal carriers have increased over the years, indicating that the railroads have offset the cost increases by greater productivity, efficiency, increased traffic volume, higher rates, operational changes and other factors; and (7) that this past experience should not be ignored in assessing the availability of ways in which increases involved in the instant proceeding may also be absorbed or offset.

Respondents replied (1) that the coal rate structure in the Southeast already reflects many efficiencies and economies surrounding the transportation of coal; (2) that rate reductions have been made in the past two decades

on single car, annual volume, trainload, concentration and unit-train bituminous coal rates for electric utility power plants; and (3) that the small increases involved herein will not violate the statutory mandate.

Conclusion.—No sufficient reason has been presented warranting relief for the involved coal shippers and receivers from the proposed increased freight rates. It is, of course, well recognized that coal is an important commodity for the Southeastern, as well as other railroads. The financial stability of coal shippers and carriers are intertwined. This has been recognized in many proceedings before this Commission. Upon evaluation of all the considerations urged by protestants, we conclude that respondents have sustained their burden of providing that the increased railroad retirement tax expense should be offset by means of the rate increases authorized by the Commission.

Joint Rates.—Certain protestants, such as the National Industrial Traffic League and the Fertilizer Institute request the Commission to insure that only rates of carriers actually incurring higher railroad retirement taxes be increased. They contend (1) that motor carriers, water carriers and Canadian and Mexican rail carriers, which do not incur any U.S. railroad employee retirement tax liability but participate in joint rates with U.S. railroads, should, by order, be excluded from receiving any of the revenue from this general-rate increase proceeding; (2) that in evaluating respondents' request, the Commission should exclude from any calculations all amounts which would otherwise accrue to carriers participating in joint rates with the railroads, but which are not subject to the railroad employee retirement tax; and otherwise, certain carriers would receive a windfall.

Respondents replied (1) that joint rates with motor carriers, water carriers and foreign carriers, such as

Canadian lines, should be increased as in past general-revenue increase proceedings; (2) that, to the extent that foreign carriers have benefits from such increases, there has been a reciprocal benefit on the part of U.S. shippers, as well as U.S. railroads; (3) that any action to limit the rates paid by shippers to Canadian railroads would adversely affect the competitive ability of U.S. railroads; (4) that if lower rates applied in Canada, the transcontinental traffic flow would be trans-Canada as far as possible; (5) that exempting from the increase, other types of joint rates, such as rail-motor or rail-water, might make the fully increased all-rail rate noncompetitive; and (6) that it would be difficult to determine the division of every such joint rate accruing to the U.S. carrier, and then apply the increase only to that division.

Conclusion.—We do not believe that sufficient reason has been presented to authorize an increase in only that portion of joint rates accruing to United States railroads. Division sheets are not generally filed with the Commission. It would not be feasible to determine the divisions from all such joint rate and increase them alone. In addition, the competitive effect of such partial increase must be considered. Highly inequitable results would follow from increasing domestic transcontinental rates, but not increasing the U.S. portion of joint international rates. If the latter rates were adjusted to eliminate the Ex Parte No. 299 increase from, for example, the Canadian division of revenue, the rate via the domestic route would have to be similarly adjusted to remain competitive, or else forego the traffic. If Canadian lines maintained lower rates on transcontinental traffic between the far west and the eastern markets, the traffic flow would, obviously, be trans-Canada as far as possible. In either event, the United States railroads would be deprived of revenue needed to offset the increased retirement costs with the likelihood that shippers would be faced with further increases on other traffic. Thus, there is a strong competi-

tive reason to deny an exemption to any portion of the international rates. Exempting a portion of joint-motor-rail and water-rail rates would be disruptive and would create similar competitive problems, contrary to the mandate of section 15a(4)(e) to preserve market patterns. The total revenue anticipated by the increase authorized in this proceeding will not completely offset the total increase retirement tax. Thus, there is no windfall in the sense of accrual of revenues in excess of the increased tax liability. Granting protestants' requests would further reduce the yield from this increase and make it increasingly difficult for carriers to offset the increased retirement tax. This, we are reluctant to do, especially in this highly inflationary period. On balance, it does not appear equitable to adopt the approach suggested by protestants. We also note that the amount of the increased tax was based only on the liability of the respondent United States railroads, and did not include any foreign carriers. In the circumstances, we conclude that exclusion of the requested increase from the joint rates involving U.S. railroads on the one hand, and on the other, Canadian and Mexican railroads, water carriers and motor carriers, respectively, on the other, would not be warranted and is denied.

Port Relationships.—Protestant, Puget Sound Traffic Association (PSTA)[3] contends (1) that the proposed percentage increase, together with prior similar increases, disrupts existing market patterns and relationships and present port relationships; (2) that percentage increases in import/export rates have had a disastrous effect on traffic to and from points in the Pacific; (3) that the total transportation charges must be considered, including the

[3] Composed of the ports of Seattle and Tacoma, Wash., chambers of commerce of Auburn, Bellevue, Everettt, Issoouah, Kirkland, Mercer Island, Redmond and Seattle, Wash., and over 175 manufacturers, wholesalers, jobbers and other businesses located within these communities.

ocean rates between "Pacific rim" nations, on the one hand, and various United States ports, on the other, which rates are increased on a dollars and cents per ton basis, rather than a percentage, thus maintaining a fixed differential between various port ranges; (4) that, since percentage increases are more expensive in dollar terms for the long-haul shipper, such increases in long-haul rail rates widen the spread and the dollar burden in freight charges to common destinations (a) between Seattle-Tacoma shippers, on the one hand, and mid-western shippers or east coast shippers, on the other hand; (b) between west coast ports and ports on the Atlantic and gulf coasts; (5) that unless holddowns in cents per 100 pounds are imposed, these rate differentials will be increased from $1 to $1.60 per ton; (6) that, for example, the spread in water-rail freight charges on toys from Japan to Chicago had changed from an advantage in favor of west coast ports of $4.30 (X-259) to an advantage in favor of gulf coast ports of $13.05 (X-299, 1-1-74); (7) that the requirements of section 15a(4)(e) cannot be satisfied by a finding that west coast interests are able to hold their own in the competitive market place and, therefore, existing market relationships must somehow have been preserved; (8) that a variety of factors, such as new container ship facilities, imaginative planning, and aggressive salesmanship enable the west coast ports to preserve their competitive status; (9) that Congress did not intend that west coast ports might have to wither away and die before the Commission acts to impose holddowns to protect them from the steady erosion of overland transportation costs; and (10) that a suggested holddown might be in terms of 2 cents for each percent of increase.

Respondents replied that the relatively small percentage increase uniform throughout all territories complies with the statutory mandate to preserve port relationships. They contend that any revision in setting final rates risks dis-

rupting market and port relationships and patterns and increasing the deficiency in revenues.

Conclusion.—Where percentage increases are sought without significant exceptions, and the amount of the proposed percentage is relatively small, as here, the resulting differences in the amounts of increase between long-haul and short-haul rates are not enough by themselves to warrant maximum holddowns. Long-haul shippers have often urged that the actual amount by which the short-haul shipper's rate is to be raised should be observed as the basis to determine the maximum increase or holddown in cents per 100 pounds or per ton to be applied to the corresponding long-haul rate. However, it is a general precept in ratemaking that rates are tapered to provide a lower charge per mile for greater distances. Thus, the long-haul shipper already has the advantage of a lower rate per mile than the short-haul shipper. Moreover, long-haul shippers have a definite interest in the adequacy of carriers' revenue in order to maintain facilities that will enable the railroads to continue to move volume traffic over the longer distances at rates which, in turn, permit shippers to participate in distant markets.

Before we can impose any rate limitations in the form of holddowns or otherwise, we must have evidence as to the particular market patterns and port relationships. In assigning the issues for determination in Ex Parte No. 270 (Sub-No. 1A), *Investigation of Railroad Rate Structure—Export-Import Rates and Charges—Pacific Coast*, the Commission noted that the Pacific coast ports contend, as does PSTA herein, that authorized percentage increases in export-import rates have widened the spread in the rates through Pacific coast ports over those to and from competitive ports, thus, distorting previous relationships. In several general increase proceedings, the carriers have been admonished to restore port relationships, and they have been required to maintain and preserve all existing

port relationships (including those involving the Pacific coast ports) duly established by order of the Commission or recognized customs of the trade. In an exhaustive initial decision in the above-entitled proceeding served November 26, 1973, the Administrative Law Judge made the following statements, findings and conclusions in pertinent part:

> (a) "* * * that there is no uniformity in port terminal charges at the different port ranges, nor do the rail carriers or the Commission have any voice or jurisdiction in setting the level of those charges. The respective levels of the port terminal charges are set by those for whose account the charges are published in tariffs filed with the Federal Maritime Commission."
>
> (b) that "After careful analysis, the most that can be said is that only a general competitive relationship has existed between the Pacific Coast rates and the Atlantic or Gulf Coast rates."
>
> (c) that "The record developed in the instant proceeding does not show that rail rates on export-import traffic to or from the Pacific Coast ports were ever tied to rates on traffic moving through other port ranges. The only port relationship shown in this proceeding is the general rate parity existing among the West coast ports or transcontinental traffic. It provides an example of a port relationship established by 'customs of the trade'."
>
> (d) "* * * that there is not now, nor has there ever been an existing, established, recognized, or prescribed relationship of rates on export-import transcontinental traffic between the North Pacific Coast ports, on the one hand, and the Atlantic or Gulf Coast ports, on the other hand. * * * On brief, after a comprehensive discussion, the Commission's Bureau

of Enforcement arrived at the same conclusion on this issue."

(e) that "In accordance with the prior discussion and finding, there is not existing or recognized relationship of rail rates on export-import traffic from or to OCP territory moving through the Northwest Pacific Coast ports, on the one hand, and the Atlantic or Gulf ports, on the other, in the sense that [that] language was used by the Commission."

(f) that "The Northwest Pacific ports confined their attack on the effect general percentage increases allegedly had on export-import traffic moving to and from OCP territory via their ports. No effort was made to show that the percentage increases on rates applicable to export-import traffic had caused a diversion of any traffic to other port ranges from and to points west of the Rocky Mountains."; and

(g) that "The port terminal charges, which are set by the ports and published in their Port Terminal Tariffs, show substantial increases by percentage points in recent years. As to OCP traffic for export or import, no convincing showing was made by petitioners that widening rail rates disparities caused by recent percentage increases have diverted significant amounts of OCP tonnage to Atlantic or Gulf ports."

In summary, the initial decision in that investigation indicates that there is not now, nor has there ever been an existing, established, recognized or prescribed relationship of rates on export-import transcontinental traffic between the North Pacific coast ports, on the one hand, and the Atlantic or Gulf coast ports, on the other hand. That

[4] OCP, an abbreviation for overland common point territory, is comprised of numerous origin and destination points in the area east of and including North Dakota, South Dakota, Nebraska, Colorado and New Mexico. [*Reference to note 4 did not appear in the text of the original report.*]

port investigation is not final, but is pending on exceptions to the initial decision. However, the evidence presented in the present record would not warrant any different conclusion in regard to port relationships. The general statements and evidence presented by protestant's PSTA do not establish the existence of port relationships or market patterns which the proposed rate increases would adversely affect or which the act requires to be maintained, nor has any sufficient showing being [*sic*] made to warrant granting the relief requested by PSTA. The foregoing conclusion is without prejudice to any contrary findings and conclusions which may be reached in the pending port investigation-Ex Parte No. 270 (Sub-No. 1A).

The specific and limited purpose of this general increase proceeding is to establish a rate increase to allow the railroads to offset their increased retirement taxes. As indicated above, the southern railroads have shown a need for only an increase of 2.55 percent while the eastern and western railroads need the 2.8-percent increase. The Commission has noted in past general increase proceedings that revenue need considerations can outweigh the advantage of an uniform territorial increase which would not disrupt competitive relationships. See Ex Parte No. 267, *Increased Freight Rates, 1971*, 339 I.C.C. 125, 182, 187 and Ex Parte No. 295, *Increased Freight Rates and Charges, 1973, Nationwide*, 344 I.C.C. 589, 618. Furthermore, the difference between the rate increase authorized for southern intraterritorial traffic, 2.55 percent, and that for all other territorial traffic, 2.8 percent, is only 0.25 percent, and it is not shown that such a slight difference can produce a significant, if any, disruption of market patterns or port relationships.

The actual data submitted by the railroads shows that the eastern and western railroads needed the 2.8-percent rate increase to meet their increased pension expenses. Upon consideration of the revenue needs of all the re-

spondents, and the importance of reasonably related rates to common markets throughout the United States, we find that an increase in interterritorial traffic to, from, and between all three territories in the amount of 2.8 percent should be allowed.

On import and export traffic, an increase of 2.8 percent is authorized. Compare Ex Parte No. 265, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 187. As in other proceedings of this nature, all existing port relationships duly established by order of the Commission or recognized customs of the trade shall be maintained and preserved. Any disruption in such relationships arising out of the publication of tariffs pursuant to authority herein granted shall be promptly corrected.

Lumber.—Western Wood Products Association, California Redwood Association, Western Wood Preservers Institute, and Western Plywood Manufacturer's Traffic Conference herein jointly termed WWPA, seek a holddown or maximum increase of 2 cents per 100 pounds of rates on lumber, plywood, and related articles contending (1) that previous general increases in freight rates have widened the spread between western and southern lumber to, for example, the Chicago market so that the transportation charges are almost $600 a car more for the western producer than the southern producer; (2) that during the 6 years from 1967-1972, there has been a dramatic shift in the lumber shipments to western trunkline and official territories with a decrease of 403,500,000 board feet of lumber from the West, and an increase of 534,800,000 board feet shipped from the South; and (3) that section 15a(4)(e), and prior general increase proceedings, require a holddown on lumber to preserve existing market patterns and relationships between the western and southern softwood lumber producers on shipments to the Midwest and East; (4) that respondents recognize that the only way arithmetically to avoid any change in existing rate differences is to provide for a flat increase in dollar and cents per given unit, regardless of the differences in the quantum of transportation, and without exception; and (5) that section 15a(4)(e) does not permit nominal disruption of rate relationships, but on the contrary requires that exact competitive relationships be maintained.

The Southern Forest Products Association contends, (1) that the same evidence of WWPA was presented in Ex Parte No. 295, and was found not to warrant imposition of a holddown in view of the 3-percent increase authorized; (2) that western shippers continue to dominate the official territory market, moving 3,115 million board feet of lumber in 1967 and 3,076 million board feet in 1972, as compared with the much smaller absolute amounts from the South of 800 million board feet in 1967 and 1,203 million board feet in 1972; (3) that the real reason for the change in the relative participation for western and southern species is a change in marketing patterns, not the horizontal increases in rail freight rates; (4)(a) that the acceptable standard to determine demand for lumber and related articles is the number of housing starts as reported by the Department of Commerce; (b) that housing starts have given from 1.322 million units in 1967 to 2.377 million units in 1972; (c) that the increase has been 6.5 percent in the West and 2.2 percent in the South, but a decline of 5 percent in official territory; (5) that WWPA members increased their shipments to points west of the Rockies from 2,619 million board feet in 1967 to 4,305 million board feet in 1972, an increase of 1,686 million board feet or 26.5 percent; (6) that WWPA members increased their shipments to the South from 1,221.4 million board feet in 1967 to 1,431.6 million board feet in 1972, an increase of 210 million board feet; (7) that an additional competitive factor in the official territory market is the 52 per-

cent increase in the amount of lumber and related articles coming from British Columbia, a rise from 2,146 million board feet in 1969 to 3,253 million board feet in 1972; (8) that the British Columbia lumber moves on the same rates as from the western U.S.; (9) that both WWPA and SFPA have increased their total shipments to all points;

Total shipments in million board feet

Year	WWPA	SFPA
1969	9,546	2,271.3
1971	10,040	2,856
1972	10,853	3,193

(10) that the Commission has disapproved a holddown on lumber when the increases sought were less than 6 percent, since the amount of the increase would not result in a serious distortion of the rate relationship; and (11) that no justification has been presented for a holddown on lumber. Respondents presented similar evidence and in addition, replied (1) that transcontinental freight rates are not the cause of the decline in protestants' shipments to official territory and western trunkline territory; (2) that western lumber shipments in 1971 and 1972 would probably have been even greater, except for strikes in British Columbia and the increasing export of logs through West Coast ports amounting to 2.71 billion board feet in 1972, forcing an increase to an average price of $71.70 per thousand board feet; (3) that western lumber producers do not absorb the difference between higher freight charges on shipments from the West and lower freight charges on shipments from the South to the same destinations, because if they did, western mill prices would regularly go down with the establishment of each percentage increase in freight rates; (4) that mill prices in the West do not react to general increases in rail freight rates in any consistent pattern, and

that the relative purchasing power for rail transportation services as between western and southern lumber producers has varied little or not at all in the past 30 years.

Conclusion.—Economic factors other than freight rates, including softwood lumber supply and demand and availability of freight cars determine and control the softwood lumber volume. See Ex Parte No. 295, *Increased Freight Rates and Charges, 1973*, 344 I.C.C. 589 (1973). The volume of rail shipments of lumber from the West to various regions can be traced in large part to demand. From 1967 to 1972, housing starts rose in the South 103 percent to 1.06 million, in the West, 140 percent to 527,000 but in the Northeast by only 53 percent, and only 31 percent in the north central region.[5] Residential construction accounted for 43 percent of softwood lumber consumption in 1971 and 56 percent in 1972. From 1967 to 1972, softwood lumber consumption correspondingly increased about 4.6 billion board feet in the South, 3.1 billion board feet in the West but only 0.97 and 0.94 billion board feet in the northeast and north central regions, respectively. Another factor is the rail volume from British Columbia to the northeast and north central regions, which rose 64 percent from 1,716 billion board feet in 1967, to an estimated 2,810 million [*sic*] board feet in 1972. This traffic moved on lumber rates equal to or higher than those available to western U.S. producers whose tonnage in the same years from and to the northeast and north central regions fell 807 million board feet from 7,569 million board feet to an estimated 6,762 million board feet. The evidence also shows that shipments from British Columbia and the western United States to the South have risen 35 percent from 3,141 million board feet in 1969 to 4,256 million board feet in 1972, despite the rate advantage held by southern pine producers. Thus, it is evident that the law of supply and demand, which determines the

[5] This is the designated standard U.S. Census geographic region.

price to be paid in the market place, also determines in substantial measure the volume of western lumber moving to the market. The U.S. consumption, which totalled 31.02 billion board feet in 1967, rose in 1968, fell off with the slump in the housing starts in 1969 and 1970, then rose to 40.61 billion board feet in 1972. As noted during the same period, the softwood lumber consumption in the northeast and north central regions rose by only 0.97 and 0.94 billion board feet, respectively.

Tables of various line graphs were presented, which chart the price action of six groupings of western lumber products in relation to increases on rail rates on lumber. They demonstrate that the prices of lumber rose in 1967, 1968, and 1969, despite four horizontal freight rate increases. Freight rates are only one of a myriad of marketing factors. This record clearly demonstrates that lumber shipments move without regard for the level of freight rates. Western lumber still has the largest share of the official territory market with 3,076 million board feet in 1972, as compared to 1,203 million board feet from the South. Another significant factor is the rapid rise in shipments from British Columbia to 3,253 million board feet. This increase is notable since that lumber moves on the same rates as that from the western United States, clearly demonstrating that factors other than freight rates are significant, if not controlling. While western lumber shipments to the East have declined, the amount of western lumber consumed in the southern and western markets has risen. This follows the trend of housing starts and the total consumption of lumber. In summary, the evidence which is solely related to lumber, does not substantiate protestants' contention that a holddown on lumber, plywood, or related articles is warranted.

In regard to protestants' contention that the new amendments to the act require that preservation of the exact present marketing patterns, the present wording of section 15a(4)(e) states that existing market patterns shall be preserved by "* * * increase limitations within and between the major districts *to the extent* possible without authorizing unreasonable increases in any district." (Italicizing added).

In its initial proposed legislation, the House of Representatives inserted no provision regarding the preservation of existing market patterns and relationships. 119 Con. Rec. H. 3833-3842 (daily ed. May 22, 1973). When the Senate considered the legislation, it proposed the following provision:

> Any increased freight rates authorized shall not exceed a reasonable level of types of traffic, commodities, or commodity groups and shall preserve existing market patterns and relationships and present port relationships by *uniform maximum increase limitations* within and between the major districts. [Emphasis added.] 119 Con. Rec. S. 11401 (daily ed. June 19, 1973).

Because of basic differences in the proposed bills of the House and Senate, it was necessary that a House-Senate Conference Committee agree to a compromise form. As a result of those compromise negotiations, the bill was adopted with the following language:

> Any increased freight rates authorized shall not exceed a reasonable level by types of traffic, commodities, or commodity groups and shall preserve existing market patterns and relationships and present port relationships by increase limitations within and between the major districts *to the extent possible* without authorizing unreasonable increases in any district. [Emphasis added.]

From the foregoing, it is evident that the Congres realized that a strict formula for preserving the *status*

quo was unwise and impractical. It was left to the Commission's experience and expertise to preserve existing competitive relationships to the extent possible.

Thus, contrary to the assertions of WWPA, the Congressional intent in enacting the Railroad Rate Adjustment Act of 1973 was not to preserve existing market patterns and relationships solely by flat increase in dollars or cents per given unit, but rather was to preserve those patterns and relationships to the extent possible by the best method available. In our judgment, increases in freight charges on lumber and plywood, permissively authorized in this proceeding, are in compliance with the statutory requirements.

Meats.—The Colorado Meat Dealers Association (CMDA) requests a holddown of 6 cents per 100 pounds on meat from Colorado. Its members ship about 1.5 billion pounds of meat annually by rail and truck, of which 1 billion pounds moves to the eastern seaboard. Prior to 1970, 70 percent of that traffic moved by rail and 30 percent by truck. Since that time, motor carriers have handled most of the tonnage due to improvements in their service. An additional reason was the railroads percentage method of increasing rates. However, CMDA candidly admits that "the adverse impact of this method was largely lost in the shuffle, if for no other reason that during this very period, motor carriers were able to come on so strongly." Now with the increased cost of diesel fuel and the lowered maximum highway speed limit, truck service is getting more expensive and slower. CMDA states that railroads are becoming more attractive, and now it is concerned about the method of imposing rate increases on long-haul rail traffic. Its concern is to find a method of increasing rates in a manner which will permit its members to continue competing effectively in their long-haul east coast markets.

Dressed carcass meats are sold on a delivered basis with the freight charges being included in the quoted price. Since the quality of meat is controlled by the U.S. Department of Agriculture through inspection and grading, the amount of the delivered price is, for the most part, the sole factor in determining whether to select a particular slaughterer. Competition among meat packers is so intense that sale prices for carcass meat turn on increments of a quarter of a cent a pound and sometimes as low as an eighth of a cent a pound, although the latter is more common in making or breaking a sale of box meat. The Missouri River or Omaha market price is the key or basing point for determining prices in the east coast markets. The *National Provisioner Daily Market Service* is a daily quotation sheet containing prices of various cuts of meat. All meat purchasers base their decision to purchase on these prices. The prices are those at Omaha plus between \$3 to \$3.25 per 100 pounds. These amounts or differentials represent the estimated transportation charges incurred in moving live cattle to Omaha for slaughtering and in shipping the dressed product to the particular eastern market. However, a difference in actual freight charges of between 50 and 60 cents per 100 pounds, as between rates charged to the Missouri River packers (Omaha, Kansas City, and environs) and those charged to the Colorado packers, is a sufficient margin for the Colorado packers to compete effectively in eastern markets. When the differential exceeds 60 cents per 100 pounds, not only do the river packers have an advantage in quoting a sale price in the eastern markets, but, CMDA contends, they can afford to raise the bid for Colorado cattle. Thus, CMDA urges the necessity of keeping the maximum differential at 60 cents per 100 pounds. CMDA points out the differential grew to 87 cents, as a result of the succession of general revenue proceedings. Since that time, the rates have been restructured to bring the disparity within tolerable limits. Now, CMDA asserts, the question

is whether any lessons from the past have been learned by the rail carriers. It urges that a holddown is necessary in this proceeding, especially in view of section 15a(4) (e), and the imminence of further general increase proceedings.

Respondents reply that (1) while CMDA may [*sic*] at a disadvantage competing with Omaha packers in east coast markets, it has a corresponding advantage in regard to the Los Angeles market; (2) that as a result of reduced incentive loading TOFC rates, effective December 2, 1972, the rate differential between Colorado and Missouri origins, for example, to New York City, has dropped at the X-295-A level to 34 cents. Respondents contend that the present differential is far under the maximum of 60 cents sought and, thus, oppose the imposition of any holddown on meats from Colorado.

Conclusion.—It is apparent that the restructuring of the rail rates on meats to the East has reduced the spread between Colorado and Missouri to a level which protestant admits is reasonable and will enable the Colorado shippers to compete. Under the increases authorized herein, there will be no change in that differential. In the circumstances, no justification has been presented for a holddown on meats.

Grain.—The Board of Trade of Kansas City, Mo., Inc., contends (1) that the tariff should contain "G tables" which are special tables used in determining the amount of the increase in rates on grain, grain products and soybeans; (2) that such tables, which have been used in prior general increase proceedings, progress increases in increments of one-half cent rather than 1 cents per 100 pounds; (3) that one-half cent is very important to grain, which is often traded in fractions as low as one-quarter cent per bushel; and (4) that the proposed tariff results in widening the historic spread between certain towns and also results in uneven, instead of uniform percentage

increases. The Board of Trade of the city of Chicago joins in the request to publish a separate increase table applicable to grain, as was done in Ex Parte Nos. 265 and 267.

Conclusions.—In Ex Parte No. 295, *Increased Freight Rates and Charges, 1973*, 344 I.C.C. 589, in authorizing a general increase of 3 percent, we required a one-half cent progression in grain rates. A similar finding is warranted herein and an appropriate order will be entered.

Miscellaneous.—Inland Steel expressed concern as to the method of expressing rate increases in units of less than 1 cent, and has proposed using the decimal system in tenths, rather than fractions; it urges that decimals are simpler and more manageable in electronic data processing systems; that tenths-of-a-cent in all values ($0.001 through $0.009) require the same three positions, but fractional rates of one-quarter cent and three-quarters cent require one additional position ($0.0025 and $0.0075); and that to a computer system designer, requiring one more position to describe rates on an already crowded computer card is wasteful and thus, objectionable. Inland requests us to instruct the carriers to publish rates decimally in the future.

Respondents reply that in order to provide some increase in all rates at the low levels, in this case, below 18 cents, and to accommodate computer application purposes, they would be willing to provide decimals in tenths in lieu of the one-quarter cent and three-quarter cent multiples now shown in table 2.6 Tariff X-299, provided the decimals were derived by rounding upwards; for example, one-fourth cent would become 0.3 cent and three-quarters cent would become 0.8 cent. Inland Steel is not opposed to this modification of its decimal proposal.

Conclusion.—Strict adherence to a small percentage increase on these low rates, for example, rates below

18 cents, would reintroduce the historical problem of reductions or no increases in certain rates. (See table 1.90 to supplement 35 of Tariff X-281-B). However, we agree that fractional increases in the form of decimals would be acceptable in the future in similar general increase proceedings, so long as normal rounding procedures are followed, namely, fractions resulting from the application of the rate increases approved herein will be dropped if less than a half-cent and increased to the next higher whole cent if a half-cent or more. See note 1 of Item 200 of Tariff of Increased Rates and Charges X-295-B-X-299-B-X-303-B, issued October 16, 1974, effective December 1, 1974. With the growing complexities in all aspects of business and government, computers must be relied upon to manage the increasing volumes and tempo of informational changes and transactions. Assembling computer libraries of freight rates is one means of coping with modern demands in the field of transportation. In our 86th Annual Report, page 57, we noted that "Generally, the Commission's desire is to promote efficient computer applications to tariffs, and at the same time to recognize the continuing need for easy use and interpretation of the computerized matter." We believe that in proposing similar general increase tariffs in the future, the rounding of fractions to whole cents as described above will be in furtherance of that policy.

Scrap Iron.—The Institute of Scrap Iron and Steel objects to the uniform percentage increase contending (1) that such across-the-board increases further widen the unjust and unreasonable rate disparities which now exist between secondary materials, particularly scrap iron and steel, the major recyclable commodity, and the competitive virgin natural resource, iron ore, thus discouraging the movement and recycling of a key recyclable commodity, while encouraging the movement and use of an irreplaceable natural resource; (2) that a uniform percentage increase applicable alike, both to scrap iron and steel and

to iron ore, commodities proven to be competitive raw material inputs to the steelmaking process, would alter the competitive relationships contrary to the mandate of Congress; (3) that Public Law 93-69 does not change in any manner, the Commission's obligations and responsibilities to consider the environmental impact resulting from its actions; (4) that the negative environmental impact of such a rate increase must be considered by the Commission; (5) that the Commission must ensure that the rate increases ultimately approved preserve existing market patterns and relationships between secondary materials and competitive virgin resources by providing the necessary rate holddown on scrap iron and steel; and (6) that the maximum rate increase permitted on scrap iron and steel should be no greater than the actual cents per ton increase on iron ore calculated by multiplying the most current average iron ore rate (U.S. to U.S.) by the percentage rate increase authorized.

Respondents replied (1) that Penn-Central, which handles about 37 percent of the U.S.-rail tonnage of iron ore and steel scrap, transported over 10 million tons during 1970, 1971, and 1972, and expected to haul over 12 million tons in 1973, despite a succession of rate increases; (2) that the sought rate increase should have no effect on the prices of scrap iron, which are at record highs; (3) that, for example, the price per ton of No. 1 heavy melting scrap at Pittsburgh rose almost 50 percent from $56 in August, 1973 to $78-80 in December 1973; and (4) that section 15a(4)(b) precludes the necessity of an environmental assessment since it requires the Commission to act on an appropriate petition to increase rates in an expedited manner "Notwithstanding any other provision of law, * * *"

Conclusion.—We agree with respondents that Public Law 93-69, which amended section 15a of the act and provides for the pass-through of the increased tax liability

in the form of increased freight rates "Notwithstanding any other provision of law, * * *" obviates the necessity of complying with the procedures of earlier enacted National Environmental Policy Act of 1969, 42 USC §§ 4321 *et seq.*, but only with regard to the interim rates. Use of broader language can hardly be imagined to convey the intention of Congress that the Commission is freed from all other strictures of law in permitting an immediate increase in rates. The legislative history indicates the concern of Congress over the lag between the time the carriers incurred increased costs and the time when they were able to adjust the freight rates. Public Law 93-69 provided changed rate procedures. It was both an amendment to the Interstate Commerce Act and a companion amendment to the Railroad Retirement Act, which imposed increased tax liabilities on the railroads shifting some of the tax liability from the railroad employees to the railroad employers. In order to rapidly offset this increased cost item, the Congress obviated the necessity of complying with other statutory requirements. While it mandated this in connection with permitting the interim rates to become effective subject to a refund, it is not shown that in the final rate determination compliance with NEPA is to be omitted. The prefatory phrase in section 15a(4)(b), dealing with interim rates, does not appear in subsection (c), pertaining to the final rate determination.

General revenue proceedings are "major federal actions" *Aberdeen & Rockfish R. Co.* v. *SCRAP*, —— U.S. ——decided June 24, 1975. However, "the general rule has been that the ICC may confine its attention in general revenue proceedings almost entirely to the need for revenue and to any other factors that relate to the legality of the general increase as a whole; and it follows *a fortiore* that if attention is given to other issues, that attention may be of a limited nature." *Scrap* case *supra*. In this proceeding as in the case under review by the United States Supreme Court in the *Scrap* case, *supra*, we have given the environmental issues the "hard look" that is required. A preliminary assessment of environmental considerations under the NEPA of 1969 was issued on July 3, 1974. In it we concluded that "With respect to recyclable commodities, the proposed rate increase [which for the purpose of the TAS included that sought in Ex Parte No. 303] will not materially impede their movement and consumption in relationship to their virgin resource counterparts. Since economies, other than transportation, generally provide the principal constraints on recycling, increased freight rates equate to fairly insignificant reductions in the total amount of recyclables entering the production process. In fact, it is probable that the major hindrance to some recycling programs is not the transportation segment, but rather the market availability of the particular commodity."

An environmental threshold assessment survey is attached hereto as appendix D.

Based on both of these documents we have concluded that this proceeding will not have a significant effect on the quality of the human environment within the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969, §§ 42, U.S.C. 4321, *et seq.*

In regard to protestant's other arguments concerning the need for a holddown or maximum rate increase on scrap iron and steel, it is first noted that a comprehensive investigation is pending into that subject, Ex Parte No. 270 (Sub-No. 5), *Investigation of Railroad Rate Structure—Iron Ores*, and Ex Parte No. 270 (Sub-No. 6), *Investigation of Railroad Freight Rate Structure—Scrap Iron and Steel*. The present record contains principally general allegations without supporting evidence and in the circumstances, no probative showing has been made warranting a holddown or lesser increase on scrap iron and steel.

EX PARTE NO. 299 (SUB-NO. 1)

On August 24, 1973, the Long Island filed a separate petition to offset the increases in retirement taxes. However, the Long Island proposed increases in the form of "terminal surcharges" to be applied to all shipments originating or terminating on its lines and in amounts of 3.5 percent, effective October 1, 1973, and an additional 2.0 percent, or a total of 5.5 percent, effective January 1, 1974. By order of the United States District Court for the Eastern District of New York, the LIRR's terminal surcharge tariff became effective October 8, 1973 on an interim basis. In a supplemental petition filed November 6, 1974, the LIRR sought an increase of its interim terminal surcharge from 5.5 percent to 12.5 percent. That increase was granted by the Commission in an order dated December 6, 1974 and became effective on December 19, 1974.

The revenue from the surcharge would accrue only to the LIRR. It favors the terminal surcharge because its divisional share of line-haul rates, from and to points on its lines, is stated to be 14 percent and to recoup the retirement tax increases from its share of the line-haul rates would require an increase of 37.5 percent in all line-haul rates to and from points on its lines.[6] After deducting partially offsetting subsidies, petitioner initially estimated that the increases in the retirement expenses would be $909,339 for the fourth quarter of 1973, and $5,412,034 for 1974. It also estimated that the yield from the terminal surcharge for the fourth quarter of 1973 would be $591,000, and for 1974—$3,638,250, taking into consideration the effects of diversion to other modes of transportation. Petitioner estimated that certain of the costs could

[6] As a result of the decision in docket No. 35153, *Long Island R.R. Co.* v. *Ahnapee & W. Ry. Co.*, decided April 13, 1973, the divisional share of the LIRR was increased to 16 percent or about $1.4 million annually.

be absorbed through revenue from new traffic, reduced expenses, increased productivity and other means to the extent of $1,770,000.

In the interim report, a majority of the Commission denied the petition, stating that the terminal surcharge tariff was not a tariff supplement of the kind "ordinarily authorized in general increase proceedings;" was not concurred in by other carriers participating with it in joint rates; and is not permitted by the statute authorizing "increases in the general level" of rates to offset increased retirement taxes. The report further stated that LIRR could request the Commission to permit its participation in the general petition of the other carriers, and also request authority to file an individual tariff specifying its terminal surcharge approach which could be investigated at the hearing. After filing a complaint in the United States District Court for the Eastern District of New York, civil action No. 73-1434, *The Long Island Rail Road Company* v. *United States of America and Interstate Commerce Commission*, LIRR obtained an order restraining the Commission from refusing to permit the terminal surcharge tariff to become effective. The court required the amounts collected by LIRR as terminal surcharges to be held in a separate trust fund, subject to refund at 6-percent interest until further order of the court. The terminal surcharge tariff became effective October 8, 1973. The lawfulness of the interim tariff was approved by the three-judge district court's decision of October 18, 1974, and the dissolution of the trust fund was permitted. *Long Island R.* v. *United States*, 388 F. Supp. 943 (E.D. N.Y. 1974).

In later filed verified statements, LIRR estimated the yield from the 5.5-percent surcharge in 1974 as only $2,807,000. This was based on the assumption that the total freight revenues on all traffic to and from points on the LIRR would be about $54 million, a decrease from

the earlier estimate of $70 million. The 5.5-percent surcharge would yield $2,970,000, and adjusting for a traffic diversion factor also estimated at 5.5 percent results in a net yield of $2,807,000. This would be a little over 50 percent of the estimated increased expenses of over $5.4 million, even allowing for the partially offsetting subsidies.

As indicated above, the LIRR sought and received an increase of its interim terminal surcharge from 5.5 percent to 12.5 percent, effective December 19, 1974, on the grounds that it had been unable to reduce expenses significantly because of inflation, the energy crisis, and the general recessionary nature of business, and that the 5.5 percent terminal surcharge had produced less revenue than expected. At a hearing concerning this increase surcharge, held on February 10, 1975, the LIRR submitted data reflecting the increased payroll taxes actually experienced and the revenues realized from the interim increases granted in this proceeding for the fourth calendar quarter of 1973 and for each calendar quarter of 1974. To determine the accuracy of this data, it was compared with that contained in ICC Wage Forms A and B as well as the Long Island's 1973 and 1974 annual reports to the Commission. Based on these comparisons, the data appears reasonable and is acceptable in this proceeding. Furthermore, no other party attempted to rebut it.

For the fourth calendar quarter of 1973, the Long Island incurred additional retirement taxes of $884,767, which was less than the $909,339 originally predicted and was probably the result of having slightly fewer employees (7102) than anticipated (7130). The 3.5-percent interim terminal surcharge produced only $425,816, thus failing to recover the total tax increase by $458,951. This revenue was less than the anticipated $591,000 and probably reflected the 2.5 million less freight revenue ton-miles (the actual 9.2 million as compared to the predicted 11.7 million freight revenue ton-miles). In order to have re-

covered its increased taxes fully, the Long Island would have needed a terminal surcharge of about 7.27 percent.

For the calendar year 1974, the Long Island experienced additional retirement taxes of $6,027,156, which was higher than the original estimate of $5,412,034. This increase was probably the result of employment levels that were higher than predicted and of the increase in the taxable base per employee from $1,050 to $1,100. Total freight revenues on all traffic to and from points on the LIRR was $48 million, which was less than expected, and the yield from the interim 5.5-percent terminal surcharge was only $2,637,803, which produced a deficiency of $3,389,353. However, this deficiency is slightly overstated since the increased interim terminal surcharge of 12.5 percent became effective on December 19, 1974 and is not reflected in the figure for 1974's terminal surcharge revenue. The Long Island maintains that if the 12.5-percent terminal surcharge had been in effect for all of 1974, the additional revenue generated would have been $5,995,008 and only slightly less than the actual retirement tax increase of $6,027,156. In order to meet its full tax increase, the Long Island would have needed a terminal surcharge of 12.57 percent.

The Long Island estimates that for 1975 its increased retirement tax expense will be $6,253,595 while its 12.5 percent terminal surcharge will produce $6,066,494. Since this additional revenue would be almost $200,000 less than the extra taxes, the Long Island maintains that the amount of its surcharge is clearly reasonable.

LIRR contends (1) that on the assumption that its divisions would average about 20 percent, it would receive only about $269,000 per year from joining in the other carriers' 2.8-percent general increase to meet its increased cost of over $6 million; (2) that if the 12.5-percent terminal surcharge were subject to divisions, LIRR would

receive only $1.2 million per year; (3) that its liability for the retirement tax increase stems from its freight operations in interstate commerce; (4) that a substantial portion of the retirement tax increase arises from its intrastate passenger service; (5) that since 1958, various increases in intrastate passenger fares have been predicated basically on deficits sustained from the entire passenger and freight operation; (6) that in view thereof, and the intent of Public Law 93-69, the additional retirement costs should be borne by increases in interstate freight rates; (7) that the deficit in railway operating income from LIRR passenger service for the 12 months ending September 30, 1973, is in excess of $61 million, and any increases in the intrastate passenger fare structure should be used to meet that deficit; (8) that if other carriers pooled the revenue from a general surcharge and distributed the excess to carriers in proportion to their increased expenses, the LIRR would be willing to cancel its terminal surcharge; (9) that LIRR's total deficit for 1974, based upon unaudited preliminary figures, was about $108 million, of which about $14.2 million was attributable to freight service.

In a later brief, the LIRR also maintains (1) that even with the imposition of the 12.5-percent terminal surcharge, the LIRR's rates are below those of other railroads serving the New York City area, and thus this surcharge does not disrupt but tends to restore market and port relationships; (2) that because of the existing low level of LIRR's rates and the increased price of fuel, the 12.5-percent surcharge is unlikely to cause diversion to motor carriage; and (3) that its receipt of cash loans or advances from the Metropolitan Transportation Authority is similar to the Penn Central's receipt of cash loans from the Federal Government and does not justify the denial of a sufficient rate increase to offset its increased retirement taxes.

In regard to the legal question of whether LIRR may file its increase in the form of a terminal surcharge, it

contends (1) that the failure of the connecting carriers to concur in the terminal surcharge, a reason cited in the interim report, is not a bar to its approval since section 15a(4)(b) provides that the Commission shall permit necessary increases in rates, "[N]otwithstanding any other provision of law * * *;" (2) that the statute permits, but does not require such rates to be published in tariff supplements of the kind ordinarily authorized in general increase proceedings; (3)(a) that since the interstate traffic handled by the LIRR, which does not originate or terminate on its line, amounts to less than one percent of the interstate traffic it handles, the effect of the terminal surcharge is a general, across-the-board percentage increase of the freight rates applying to LIRR interstate freight traffic; (b) that, with the exemptions proposed by the respondents in the title proceeding, their general increase does not purport to cover 100 percent of their interstate traffic; and (4) that surcharges have been approved in certain prior general increase proceedings, notably, Ex Parte Nos. 166, 175, 281 and more recently, the 2.1 percent surcharge to offset fuel costs in X-301-A (Special Permission No. 1825). In its later brief, the Long Island contended that as a result of the decision of the three-judge district court in *Long Island R., supra.*, the terminal surcharge is undoubtedly legal at least as an interim measure.

In their brief, the protesting railroads, except the Central Railroad Co. of New Jersey, contend (1) that the terminal surcharge is unlawful,[7] (2) that in the passage of Public Law 93-69, there was no legislative intent that prior law be changed, except for an expedited procedure for putting into effect increases which otherwise might be delayed under Commission procedures; (3) that in a decision and order in Docket No. 35153, *Long Island Rail*

[7] While Penn-Central Transportation Company generally joins in this brief, it does not concur in this section.

Road Co. v. *Ahnapee & Western Ry. Co.*, decided April 13, 1973, herein termed the *Long Island Divisions* case, the Commission's Division Two adopted, as pertinent here, the report of the Administrative Law Judge rejecting the notion that it was fair to impose an increase in rates applying to freight service because since 1958, various increases had been obtained in fares for intrastate passenger service based upon deficits sustained from the entire railroad operation, including freight service; (4) that in the last-cited case the divisions of the LIRR were increased, effective October 4, 1973, but that the terminal surcharge which became effective October 8, 1973, applying to joint-through rates, changes the divisions accruing to LIRR from such joint rates without concurrence of the involved railroads and without approval of the Commission; (5) that in *Interstate Commerce Commission* v. *Columbus & Greenville R. Co.*, 319 U.S. 551 (1943) herein termed the *Columbus & Greenville* case, it was held that a tariff of an individual railroad which operated to reduce rates of carriers participating in joint-through rates without the concurrence of participating carriers, violated sections 1(6) and 6(7) of the act; (6) that the rule in (5) above applies with equal force to the situation where a carrier party to a through rate establishes a higher rate for its portion of the through haul, thus, altering the through charges established by tariffs publishing joint-through rates of the participating carriers; (7) that on traffic originating or terminating on the LIRR, connecting carriers, which perform most of the transportation service, are deprived of any additional revenues from Ex Parte No. 299, since LIRR retains all the revenue from its terminal surcharge; (8) that the possible proliferation of similar terminal surcharge tariffs and the difficulties of shippers in determining charges on through movements are obvious; (9) that LIRR did not sustain its burden of proof by a mere showing of revenue needs; (10) that if the manner of increasing rates by surcharges is approved,

other carriers in other proceedings will attempt to increase their portion of revenues on through movements without obtaining concurrence of connecting carriers; and (11) that the LIRR should seek authority to increase its passenger fares together with the percentage increase on freight traffic to offset its retirement cost increases, instead of getting the full amount from its freight operations, and at the same time, penalizing all of its connections.

Later briefs filed by the southern and western railroads repeat the above arguments. In addition, the western carriers assert that the tariff provision governing the application of the terminal surcharge does not conform to the publication requirements contained in 49 CFR 1300.4(i) in that it does not explicitly state the increase in dollars and cents per unit or the names of places from and to which it applies.

Discussion and Conclusions.—The Long Island's status as a carrier predominantly of passengers has been recognized as unique. Over a quarter century ago, its passenger revenues were twice as great as those from freight operations. Since then, its freight revenues have continued to decline. In 1972, while its total revenue was $94.3 million, only about $9.2 million was derived from freight service. In 1974, its total deficit, based upon unaudited preliminary figures, was about $108 million, of which about $14.2 million was assignable to freight service. Finally, as noted, joining in the 2.8 percent general freight rate increase would yield about $269,000 from the divisional arrangement, whereas the 12.5 percent terminal surcharge is expected to yield about $6 million annually.

The LIRR tariff results at present in a 12.5 percent terminal surcharge being added to the freight bill covering all traffic originating on or terminating on its lines. Under the terms of the tariff, the revenue will accrue solely to the Long Island.

We find that the Long Island needed increased revenues to offset increased retirement costs of $884,767 in the fourth quarter of 1973 and of $6,027,156 in 1974. The proposed terminal surcharge of 12.5 percent would have yielded $5,995,008 if it had applied during all of that year.

WWPA, Phelps Dodge Corporation, and Westinghouse Electric Corporation opposed the amount of the Long Island surcharge and the form of publication, since it is only published in the tariff of the LIRR, and also because it is a separate add-on charge. Other opposition was expressed by long-haul shippers who strongly urge, as they did in the title proceeding, that the statute requires imposition of limitations in the form of an increase in flat amounts rather than percentage increases. These protestants offer no probative evidence warranting the imposition of any holddown or other limitations. However, we find merit in the argument that the terminal surcharge tariff is not the proper form of publication. We have considered surcharges in prior proceedings. In *Surcharges, New York State*, 62 M.C.C. 117, 133, we stated that:

> The maintenance of surcharges has usually been resorted to only as an emergency and temporary means of obtaining revenue above and beyond that which is derived from the prevailing rate structure. * * * We agree also with protestants that, generally, it is not a sound and orderly ratemaking practice to isolate a single operating tax from all other operating expenses, and maintain a surcharge based thereon. * * * Moreover, if this practice were followed to its logical extreme, rates might gradually be broken down into a multitude of surcharges, each set up for a particular expense. Such a practice, obviously, does not foster or promote the simplification of tariff publication.

It is true that the Commission has from time to time permitted the maintenance of surcharges, but only in instances where there was a compelling reason therefor and in no case as a permanent form of publication. *E.g.*, see Ex Parte No. 175, *Increased Freight Rates, 1951*, 281 I.C.C. 557, 638, wherein we stated:

> The record convinces us that the freight-rate structure, in its gradual ascendency since June 30, 1946, to higher levels, has reached the point where the needs of the carriers for additional increases in revenues in the foreseeable future should be provided by measures which will avoid the integration of the increases with the existing or basic rates *per se*. This means that, in our judgment, no revenue increases as a result of this proceeding, including those previously granted herein, should be prescribed as permanent or unremovable additions to the freight-rate structure. We shall, therefore, retain jurisdiction of this proceeding and our findings and order, and the increases which we shall authorize shall continue only until the further order of the Commission, but not later than February 28, 1953. They will take the form purely of revenue increases to be added to the total freight charges or freight bills and not as integral parts of the rates themselves.

In that proceeding the surcharge was retained because at that time it could not be determined whether additional increases in revenue may have been needed. However, upon further hearing in 297 I.C.C. 17, 51, we found that the increases authorized by our report and order of April 11, 1952, in 281 I.C.C. 557, should be published to apply in connection with rates per 100 pounds, per ton, per car or per other units of transportation and cancelled the surcharge.

While, for good and sufficient reasons, a surcharge might be authorized for temporary periods, it creates a

disability which mitigates against authorizing any extended period of application. The tariffs naming joint rates from and to points on the LIRR provide rates for the *complete* line-haul service from and to the named points. Thus a shipper or other tariff user has a right to and should be permitted to rely upon what the tariffs plainly say. For a single line to publish and maintain its own tariff naming a surcharge which changes the line-haul rate and charges, making them something other than what the tariffs plainly state, which individual tariff need not be and is not posted anywhere in the country other than at places on the LIRR and therefore for all practical purposes unknown to that tariff user, it is to fly in the fact [*sic*] of the purpose of section 6 of the Act. There is ultimately only one acceptable location for any provision that changes the published line-haul rate—in the tariff that names the line-haul rate or in a governing publication, which is considered as incorporated by reference. Nor is the master tariff the long-term solution. The master tariffs are referred to by the line-haul tariffs, but each for only a temporary period, as we insist that each be phased out as quickly as they have served their temporary purpose, incorporating the provisions thereof into the rate tariffs.

Section 6(3) of the act authorizes this Commission to make suitable rules and regulations "for the simplification" of schedules of rates. We have not accepted surcharges which cover no service or privilege as being authorized except by special permission order issued for good cause shown granting relief from our regulations, including rule 4(i) of the Commission's Tariff Circular No. 20. Rule 10 of this same tariff circular, 49 CFR 1300.10, authorizes carriers to publish tariffs containing rates and charges for terminal and special services, such as demurrage, switching, floating, lighterage, etc., but does not authorize the publication of charges where no service is performed or privilege accorded. This rule refers to

charges or privileges which increase or decrease the value of service to the shipper. The LIRR terminal surcharge tariff does not cover any service or privilege to the shipper but is designed to generate revenue to cover operating expenses incurred as the result of the Railroad Retirement Act. Under the circumstances, to maintain the surcharge tariff will require relief from the Commission's tariff publishing regulations.

We are by this report and order authorizing the temporary continuance, for a period of 2 years from the service date hereof, of the LIRR surcharge tariff, but ultimately there is no place for such provisions except in the rate tariffs naming the joint rates from and to the stations on the LIRR. It is recognized that such transfer or provisions will require an orchestration of efforts of both the LIRR and the other carrier and agents and that proper timing is not going to be an easy task. Nevertheless, it is necessary that this present unsatisfactory state of the tariffs, collectively, be corrected, and we charge all affected carriers and their agents with the duty to achieve this end as quickly as possible, but in any case within the 2-year period we have authorized for the life of the LIRR surcharge tariff.

The western railroads maintain that the terminal surcharge has been improperly published in that the increase is not stated in dollars and cents per unit and the names of places from and to which it applies are not given. The tariff clearly states that the LIRR's increase is a surcharge of 12.5 percent of the total line-haul freight charges. This will suffice for the present. Also, it is clear from the tariff that only those movements where the origin or destination point is on the LIRR are subject to the increase. We find no merit to this contention of the western railroads.

Protesting rail carriers urge that, since LIRR is predominantly a passenger carrier, its fare structure should

bear some burden of the increased pension cost. Referring to Public Law 93-69, they urge that "It was not the purpose of the law to remove all restraint upon a carrier seeking to recoup the increased retirement taxes imposed on it by selecting only one class of traffic to be subjected to the increase."

But in proposing the general increase in their freight rates, protestant railroads have not excluded the increased retirement taxes of their employees engaged in commuter or other passenger service, (although as noted in the final computation, subsidies from Amtrak, Metropolitan Transit Authority (MTA) and other public bodies have been deducted). Some recent requests seeking increased commuter fares, but based on a duplicate inclusion of increased retirement costs, have been disapproved. Whether the passenger fare structure of the LIRR should bear some of this increased pension cost is a question of managerial discretion more properly directed in the first instance to the MTA, which operates the Long Island, the largest commuter carrying railroad in the largest metropolitan area in the country. We observe in passing that the LIRR passenger deficit for 1974 is estimated at $108 million. Presumably, the revenue from a fare increase would be needed to combat that deficit.

Protestants also referred to our conclusion in *Rules to Govern Assembly & Presenting Cost Evidence*, 337 I.C.C. 298, 308, 326, that passenger deficits are elements of non-cost character which should be excluded in the determination of variable and fully allocated costs. This conclusion was also referred to in the *Long Island Divisions* case where the passenger deficits were excluded in determining the fully distributed costs of certain traffic of the LIRR and official territory railroads.

We are not here determining the appropriate costs or cost level of any particular traffic. This is a proceeding in

which we are determining the amount of revenue needed to offset specific increased retirement taxes. This distinction was recognized in appendix II to *Rules to Govern Assembly & Presenting Cost Evidence, supra*, page 395:

> Indeed, the Commission has found it necessary to take into account [the passenger deficit] * * * in determining the revenue needs of the railroads, especially in general increase cases.

An extensive discussion of the manner of treating the passenger deficit in general increase proceedings is contained in *Increased Freight Rates, 1948*, 227 I.C.C. 9, 32. In *The Five Percent Case*, 31 I.C.C. 351, 392 (1914), it was stated that "We know of no provision of law under which we should be justified in increasing freight rates to provide a return upon property used exclusively in the passenger service, much less to take care of losses incurred in such service. In our opinion, each branch of the service should contribute its proper share of the cost of operation and of return upon the property devoted to the use of the public." However, as long ago as *Revenues in Western District*, 113 I.C.C. 3 (1926), it was recognized that the law and economic conditions had changed since *The Five Percent Case, supra*. In many general increase proceedings, we have held that if the passenger service, inevitably and inescapably, could not bear its direct costs or its share of joint or indirect costs, such passenger deficit must be taken into account in adjustment of freight rates and charges. We reach the same conclusion in regard to the terminal surcharge of the Long Island, and find that there is nothing unlawful in using it to offset its total increased retirement taxes, including those of employees engaged in commuter and other passenger service.

The *Columbus & Greenville* case cited by protestants involved a system of cut-backs which permitted one who shipped cottonseed into the mill point and paid the full

local rate for that inbound haul, to receive back part of that amount so paid if he later shipped the product outbound by the same carrier. If the outbound haul was not by the carrier that made the inbound haul, he was not entitled to the cut-back. C & G's tariff gave shippers the benefit of the cut-back, whether the inbound movement was over its own line or that of a connecting carrier.

The tariff operated in the following manner: Take a shipment of cottonseed from Coahoma, Miss., a point on the Y. & M. V. Railroad to Greenville, Miss., a distance of 87 miles. The rate for that haul is 8.4 cents per 100 pounds. That rate is collected when the seed moves to Greenville by the Y. & M. V. It is not the rate published in C & G's cutback tariff, nor in the cut-back tariff of the Y. & M. V. It is the local rate on the Y. & M. V. Now when the seed is processed and cottonseed oil moves outbound from Greenville to Cincinnati over the line of the C & G, a rate of 48 cents per 100 pounds is collected, which is the joint rate applicable over C & G and its connections to Cincinnati. However, if under the tariff in question, the shipper files its claim, it will be refunded by the C & G to the basis of the rate set forth in its tariff for 87 miles or 7 cents.

C & G was not a party to the inbound rates on cottonseed from points on the lines of its connecting carriers to the mill points, and no other carrier was a party to its cut-back tariff. The difference between the practice of the C & G and the trunklines was that it made an allowance on seed that did not originate on its own line, and absorbed the allowances out of its proportion of the outbound rates, to which it was a party.

The opposing carriers contended that C & G's tariffs attempted to name rates for account of their lines without their concurrence.

The ultimate finding in the report of the entire Commission, 248 I.C.C. 441 was that, to the extent respond-

ent's tariff provided for refund, or cut-back to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1(6), sections 6(4) and 6(7) of the Interstate Commerce Act. In affirming the Commission, the Supreme Court stated that "The Commission's view that the tariff operated to reduce such outbound rates without the concurrence of the participating carriers is at least a tenable one, and one we are not disposed to gainsay."

The holding in *Columbus & Greenville* is not applicable to this proceeding. There, the C & G's tariff was essentially a rebate and served to establish a 7-cent rate between Coahoma and Greenville, Miss., local points between which it did not operate. In the present proceeding, Long Island has extensive joint rates with connecting carriers. Such rates are unaffected by the surcharge. It is a separate charge in its individual tariff, the revenue from which accrues to the LIRR to offset its increased retirement tax cost. While it affects the total freight charges, it does not change any joint rate. The difference is more than semantical. The charges for many individual transportation services are involved in computing the total freight charges, but the revenue from them often accrues solely to individual carriers. See also *Central R. Co. of New Jersey* v. *United States*, 257 U.S. 247, 255 (1921).

From the foregoing discussion, it clearly follows that the assertion that the terminal surcharge changes the joint rates and increases the divisions accruing to the Long Island is incorrect. The joint rates and divisions thereof are unchanged by the surcharge tariff. The surcharge is a separate add-on to the line-haul rates, the yield from which accrues solely to the LIRR, which flagged out of the general increase of respondents. The surcharge is not incorporated in the joint rate, and is not subject to any divisional agreement between the carriers. Thus, the concurrence of connecting carriers was, and is unnecessary.

Conclusion.—The terminal surcharge of the Long Island Rail Road Company is approved. Within 2 years from the date of service of this report and order, this terminal surcharge must be incorporated by the railroads into all the tariffs naming joint rates from and to points on the Long Island's lines.

Ultimate Findings and Conclusions

Upon consideration of the entire record in these proceedings, we conclude and find:

1. Respondents are in need of additional revenue from their interstate freight rates and charges to offset the increase in taxes, as a result of the Railroad Retirement Tax Act, as amended.

2. Without the additional revenues to be derived from increased freight charges, the earnings of respondents would be insufficient to enable them under honest, economical and efficient management to provide adequate and efficient railroad transportation services consistent with the public interest and the national transportation policy.

3. Freight rates and charges on interstate traffic may be increased as follows from the X-295-A revenue level:

(1) Intraterritorial traffic within the South—not more than 2.55 percent.

(2) Intraterritorial traffic within the East and West—not more than 2.8 percent.

(3) Interterritorial traffic from and to all territories—not more than 2.8 percent.

(4) Import and export traffic—not more than 2.8 percent, and subject to limitations described in this report.

The increases authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railroads not in excess of that required to enable them to render adequate and efficient transportation.

4. On grain and grain products, increased surcharge tables shall progress in one-half cent increments.

5. Our findings as to justness and reasonableness, which are based upon all of the evidence before us, will apply to the general bases or rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increase authorized herein is not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided in the act and our general rules of practice.

6. The terminal surcharge of 3.5 percent effective from October 8, 1973, to December 31, 1973, and of 5.5 percent in lieu of 3.5 percent effective January 1, 1974, and of 12.5 percent in lieu of 5.5 percent effective December 19, 1974, in the Sub-No. 1 proceeding, is approved. Within 2 years from the date of service of this report and order, this terminal surcharge shall be incorporated by the railroads into all tariffs naming joint rates from and to points on the Long Island Rail Road Company.

7. The increase and the terminal surcharge authorized will have no undue adverse effect on the movement of traffic by railway or upon the environment.

An appropriate order will be entered (1) requiring the cancellation of the schedules under investigation herein found not justified, without prejudice to the establishment or maintenance of schedules in conformity with our findings herein, and (2) modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized, and (3) granting relief from the provisions of section 4 of the act and our tariff publishing rules as may be necessary, including authority to publish and file tariff changes.

VICE CHAIRMAN O'NEAL, dissenting:

I do not believe that this decision satisfies Public Law 93-69, where it states: "Any increased freight rates shall not exceed a reasonable level by types of traffic, commodities, or commodity groups and shall preserve existing market patterns and relationships and present port relationships by increase limitations within and between the major districts to the extent possible without authorizing unreasonable increases in any district."

The report concludes that "where percentage increases are sought without significant exceptions, and the amount of the proposed percentage is relatively small, as here, the resulting differences in the amounts of increase between long-haul and short-haul rates are not enough by themselves to warrant maximum holddowns." I cannot agree. It is a mathematical truth that rate differentials will become more pronounced when rates are subjected to percentage increases. The fact that the percentage increase is relatively small when standing by itself does not change that truism. More importantly, when a string of small percentage increases are authorized over a short period of time, the effect on rate differentials becomes substantial. Since August 1973, Commission railroad general rate authorizations have included some relatively

small increases: Ex Parte No. 295—3 percent, Ex Parte No. 301—3.3 percent, Ex Parte No. 303—4 percent, Ex Parte No. 310—7 percent, and Ex Parte No. 313—5 percent. These will be compounded by the increases authorized herein. The size of the creeping distortion is obvious.

COMMISSIONER MURPHY, dissenting, in part:

The majority's decision today, especially in Ex Parte No. 299 (Sub-No. 1) is a setback and a sharp departure to the concept underlying the Constitution of the United States, article I, the National Transportation Policy, *preceding* §§ 1, 301, 901, and 1001 of the Interstate Commerce Act, approves and furthers undue prejudice insofar as carriers other than the Long Island Rail Road Company and shippers are concerned, errs in attempting to distinguish several significant decisions and, finally, imposes burdens upon the several railroads which can only be likened or equated to "the straw that broke the camel's back." I cannot join in that decision for a number of reasons.

The Constitution, article I, section 8, provides that:

> The Congress shall have power ***
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

The purposes underlying article I, section 8, are well known, that is, to empower the Federal Government with the sole authority to remove barriers to the free flow of commerce between the various States, among other considerations, Congress, in its wisdom, delegated its authority over interstate and foreign commerce in certain respects to this Commission. As noted, article I, section 8, authorizes the Federal Government to eliminate or to negate barriers erected by States which would interfere

with interstate commerce. The majority in its decision today would sanction the gradual imposition of equally obnoxious barriers to interstate commerce by a corporate entity, namely the Long Island. This is not only in derogation of the authority delegated by the Congress to the Commission but, more importantly, appears to be a patent violation of that most fundamental document establishing this Nation, namely, the Constitution of the United States.

It is axiomatic that the Commission's jurisdiction over interstate commerce must be exercised in harmony with the National Transportation Policy. That policy provides, in pertinent part:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (Interstate Commerce Act), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

The majority in its discussion in Ex Parte No. 299 with regard to a proposed pooling plan recognizes the need for the continuance of a national, privately owned railroad system in the following statement:

> * * * In past rail general increase proceedings the Commission, in evaluating carrier proposals for percentage increases, has viewed the railroad industry as an interdependent system and accordingly, has not stressed the needs of individual lines but has "considered the needs of the carriers as a whole or at least by major territorial groupings." See Ex Parte No. 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 309 (1972). We see no reason to change that approach here.

Nevertheless, despite the affirmation of this time-honored policy in Ex Parte No. 299, the majority then with no apparent justification proceeds to unilaterally disavow that same policy in Ex Parte No. 299 (Sub-No. 1). Consistency in the application of Commission policy and adherence to the national transportation policy's goal of "preserving a national transportation system by * * * rail * * *" are thus jettisoned in the name of expediency and in light of the difficult problems relating to the Long Island's proposal. The Commission's function is not to simply act as an impartial umpire to settle a dispute between two contestants but to administer the act in the public interest. This may, and indeed often does, require the exercise of considerable expertise, the advancement of creative and innovative solutions to difficult problems, and a certain degree of tenacity in resolving a challenging problem area. However, the decision today, as will be pointed out below, is a virtual abdication by the Commission with the conditions, in effect, dictated by the Long Island. I cannot subscribe to such a decision.

Various provisions of the act, such as sections 3(1), 3(4), 13(4), and the national transportation policy all provide for or are a means of eliminating undue preference to shippers, carriers, or intrastate traffic. Not all preference is undue.

The record insofar as the Long Island is concerned clearly shows that the expenses incurred or to be incurred by that carrier relating to retirement taxes or other benefits arise out of and are primarily related to the intrastate passenger operations of that carrier. Yet, the majority's decision would sanction the imposition of the proposed surcharge for the transportation of freight on shippers, other carriers, and the ultimate consumers. This is rank discrimination. The magnitude of the passenger operations of the Long Island (some 10 times that of its freight operations) as compared to its freight operations is such that separate consideration and evaluation must be given to the effect of the instant proposal. Failure to do so will encourage further incursions in that direction not only by the Long Island but by other carriers.

The majority further concludes that the proposed surcharge is not a division of the joint rates. Admittedly, the surcharge does not relate to any new service or privilege provided by the Long Island either directly or indirectly. Cf. *Central R. Co. of New Jersey* v. *United States*, 257 U.S. 247, 255 (1921). Since the Long Island flagged out of the increases proposed in Ex Parte No. 299, and those carriers proposing uniform increases were unable to increase their rates and charges on joint rates to and from points in the Long Island, the proposed surcharge can have no other effect and purpose than as a unilateral change in the divisions basis. It should be noted that the courts have frequently stated that the label which an administrative agency places on an action (i.e. this surcharge is not a division of the joint rate) is not conclusive since the underlying basis for the action must be closely examined. In fact, a court reviewing the matter shall "hold unlawful and set aside agency action, findings, and conclusions found to be" not in accord with specified criteria. See Administrative Procedure Act, 5 U.S.C. § 706.

Furthermore, the change in divisions in the guise of a surcharge appears to be in direct conflict with the decisions and rationale of the courts in connection with No. 298885 et al., *Official-Southern Divisions*, 325 I.C.C. 1, 337 I.C.C. 74. See, in particular, the issue in those proceedings relating to passenger service deficits, as discussed in *B.&O.R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87 (1968).

The majority also concludes that the surcharge is not in violation of the principle espoused in *Interstate Commerce Commission* v. *Columbus & G. Ry. Co.*, 319 U.S. 551 (1943) relating to a system of cutbacks. An attempt is made to distinguish the latter decision on the grounds that the tariff in question therein was essentially a rebate and served to establish a rate between local points over which the carrier did not operate. In my opinion, the principle of the *Columbus & G. Ry. Co.* decision is clearly applicable herein and should govern the disposition of this proceeding. As noted above, the surcharge does not relate to any new service or privilege provided by the Long Island directly or indirectly and reference to *Central R. Co., of New Jersey, supra*, is wholly inappropriate. In *Central R. Co. of New Jersey, supra*, the carrier actually provided a valuable privilege for the shipper, namely creosoting-in-transit. In contrast, the surcharge herein which does not provide shippers with any conceivable service or privilege can only be compared to the exaction of a tribute. Thus, the principle enunciated in *Columbus & G. Ry. Co., supra*, is controlling and the proposed surcharge is in violation of the act.[1]

[1] The tariff of the Long Island assessing surcharge provides that the Terminal Surcharge will be applied to the "total line-haul freight charges and will accrue solely" to the Long Island [Emphasis added]. As noted, the Long Island provides no new service or privilege over its local lines. The surcharge is clearly an attempt to establish or control operations over lines foreign to its own operations and without the concurrence of the other railroads. This is in violation of the act.

Turning finally to the form of the proposed increase, even the majority recognizes the inequity of approving the use of the surcharge especially for an extended period. But in doing so, it actually provides the Long Island with the privilege of using the surcharge method for a period of 2 years in lieu of the normal 1-year period usually authorized in rail general increase proceedings. See, for example, *Increased Freight Rates, 1973*, 344 I.C.C. 589. Moreover, not only have the other railroads been denied the opportunity to increase their rates and charges to and from points on the Long Island by its refusal to join with those carriers, but the majority would also require those carriers to incorporate the surcharge into all their tariffs naming joint rates to and from points on the Long Island. In other words, the other carriers would shoulder an additional burden. But he who calls the tune should be willing and required to pay the fiddler. This lack of evenhandedness in Ex Parte No. 299 (Sub-No. 1) should be compared to the decision in Ex Parte No. 299 requiring the Southern railroads to make refunds. The Commission's mandate requires the eradication of undue preference not the enhancement thereof.

Today's decision in Ex Parte No. 299 (Sub-No. 1) viewed in its broadest perspective from a Constitutional standpoint to the extremely narrow focus as to the format of the proposed increase discloses numerous violations of fundamental and statutory law, contradictory policy positions, and furthers a degree of uncertainty in surface transportation law. It has aptly been stated that hard cases make bad law and that the exception to the general rule ultimately becomes the general rule.

I do not interpret the decision of the lower court in *Long Island Railroad* v. *United States*, 388 F. Supp. 943 (1974), as requiring the approval of the Long Island's proposal either as a surcharge or in the amount proposed. In fact that court stated at page 947:

> In holding that the LIRR's proposal of a terminal surcharge was an appropriate method of effecting an interim rate increase under section 15a(4)(b), we express no view with respect to its propriety as a final solution to the problem of recovering increased costs. This is properly the Commission's decision to make in the first instance in the hearings mandated by section 15a(4)(c). The latter provision on its face appears to contemplate the consideration of more factors than are appropriate under the interim measures of section 15a(4)(b).

It is clear that the Commission is free and unfettered in reaching a just decision in Ex Parte No. 299 (Sub-No. 1). Its authority over the total transportation system has been described as having a pervasive impact. *National Industrial Traffic League* v. *United States*, C.A. No. 74-1119 (D.C. D.C.) July 11, 1975).

While a decision disposing of the Long Island's proposal presents several troublesome problems, there are, in my opinion, three major approaches to the resolution of those problems.

At the outset, it must be recognized that the problems of the Long Island are primarily related to its intrastate passenger operations. Freight rate increases to cover those operations are not appropriate. The Long Island should look to the State (New York) and other municipal and regional bodies to cover those expenses. An increase in passenger fares is one of the most promising avenues. Federal programs relating to urban mass transportation offer another approach. Those avenues are more in harmony with the concept of a common carrier service than the attempt to require strangers to the passenger transportation service to bear the burdens thereof.

The surcharge method is wholly inappropriate to accomplish the purposes of the Long Island proposal. It

creates undue preference, violates longstanding principles and is in complete disharmony with the goals of the national transportation policy. Any attempt by a carrier, be it the Long Island or others, to propose a similar surcharge in the future should be rejected.

Finally, as noted on the one hand, the Long Island unilaterally flagged-out of the increases proposed in Ex Parte No. 299 and, thus, prevented those carriers from increasing their rates and charges to and from Long Island points in order to cover their pertinent retirement taxes and other benefits arising out of those operations. Nevertheless, the Long Island, then, concurrently proposed the substantial surcharge in issue herein. In my opinion, these unilateral actions by the Long Island dictate the requirement that it be made to bear the expense of incorporating the surcharge into the joint rate tariffs rather than to require other carriers and shippers to bear that obligation. I further suggest that in any future general revenue proceeding, the cost presentations of the carriers be closely analyzed so that shippers of freight will not be subject to a double assessment arising out of the Long Island's action herein.

In light of the extensive discussion as to my disagreement with the majority, principally in Ex Parte No. 299 (Sub-No. 1), I am unable in good conscience to join in today's decision.

COMMISSIONER CLAPP, dissenting, in part:

I approve the report insofar as Ex Parte No. 299 is concerned.

However, I must dissent from the findings in Ex Parte No. 299 (Sub-No. 1). In particular, I believe that the Commission should stand by its earlier determination (made in the context of the interim increases) that the use of the so-called terminal surcharge is unsound regu-

latory procedure. Furthermore, the matter should be severed from the main proceeding and joined with Ex Parte No. 309, *Investigation Into Joint Interstate and International Rates—Long Island Rail Road Company.*

I cannot accept the reasoning in the report that the surcharge is not a unilateral change in joint rates and their divisions. If the surcharge is wholly local in character, then it must be in compensation for some service over and above the line-haul obligation. Yet, the report explicitly finds that no service of that character is being performed by the Long Island. Since no service over and above the line-haul obligation is being performed, the practical effect of the surcharge's incorporation into the joint rate tariffs will be the same as if an increase in the joint rates were allocated entirely to the Long Island. If the Long Island believes that its current share of existing joint rates is inadequate, it should commence a divisions proceeding under section 15(6). In such a proceeding, the problem of the Long Island's relationship to its connecting carriers can be given the detailed attention it deserves.

This unilateral attempt to alter joint rates and divisions is hardly fair to the other railroads. While the commuter-carrying Long Island is undoubtedly reluctant to cover its increased pension expenses through passenger fare increases, its connecting carriers have revenue needs of their own and are plagued by their own problems, including traffic diversion resulting from freight rate increases. Section 15a(4)(c) directs the Commission to apply "the standards and limitations applicable to rate-making generally under part I of this Act" in reaching its final decision in these proceedings. Thus, if the surcharge is appropriate for the Long Island here, it would seem consistent to accept that approach for any carrier under ordinary circumstances. However, it is doubtful whether this report can be understood to allow other

railroads to adopt such a parochial way to meet their revenue needs.

The Long Island admits that a substantial portion of its retirement tax increase arises from its intrastate passenger service. In the absence of a proper divisions proceeding, it can only be concluded that the surcharge is an attempt by the Long Island to have rate payers in other areas of the nation subsidize Long Island commuters. The potential burden on interstate commerce is clear. Mass transit should certainly have adequate funding, but I would question whether consumers in other parts of the country should provide such funding (via the surcharge) in the absence of evidence that residents of the New York metropolitan area are unable to provide it.

In approving the surcharge, the majority argues that "in proposing the general increase in their freight rates, protestant railroads have not excluded the increased retirement taxes of their employees engaged in commuter or other passenger service * * *." However, the practical effect of this argument is unclear in view of the small portion of most other railroads' total business occupied by passenger service, in contrast to the Long Island.

The majority also argues that "Whether the passenger fare structure of the LIRR should bear some of this increased pension cost is a question of managerial discretion more properly directed in the first instance to the MTA, which operates the Long Island, the largest commuter-carrying railroad in the largest metropolitan area of the country." Appropriate exercise of managerial discretion is fine, but in exercising their discretion the managers of MTA should consider the welfare of shippers and consumers in other parts of the country as well as that of their own clientele in the New York City area. The above-quoted language seems to imply that the re-

ceiver of a subsidy (MTA), has the sole right to decide how much should be received.

For these reasons, I believe that the Commission should require the Long Island to explain (a) why its terminal surcharge does not unduly burden interstate commerce by its application solely to freight traffic, (b) the increases which would be needed if both freight and passenger traffic were to share the retirement tax burden, and (c) why its passenger operations should not bear the retirement tax increases associated with them. These determinations can best be made in the context of Ex Parte No. 309, *supra*.

APPENDIX A

Pertinent portions of Railroad Rate Adjustment Act of 1973

TITLE II—INTERSTATE COMMERCE ACT AMENDMENTS

Sec. 201. Section 15a of the Interstate Commerce Act (49 U.S.C. 15a) is amended by adding at the end thereof the following new paragraph:

"(4)(*a*) The Commission shall by rule, on or before August 1, 1973, establish requirements for petitions for adjustment of interstate rates of common carriers subject to this part based upon increases in expenses of such carriers resulting from any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such requirements, established pursuant to section 553 of title 5 of the United States Code (with time for comment limited so as to meet the required date for establishment and subject to future amendment or revocation), shall be designed to facilitate fair and expeditious action on any such petition as required in subparagraph (b) of this paragraph by disclosing such information as the amount needed in rate increases to offset such increases in expenses and the availability of means other than a rate increase by which the carrier might absorb or offset such increases in expenses.

"(b) Notwithstanding any other provision of law, the Commission shall, within thirty days of the filing of a verified petition in accordance with rules promulgated under subparagraph (a) of this paragraph, by any carrier or group of carriers subject to this part, permit the establishment of increases in the general level of the interstate rates of said carrier or carriers in an amount

approximating that needed to offset increases in expenses theretofore experienced or demonstrably certain to occur commencing on or before the effective date of the increased rates, as a result of any increase in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such increases in rates may be made effective on not more than thirty nor less than ten days' notice to the public notwithstanding any outstanding orders of the Commission. To the extent necessary to effectuate their establishment, rates so increased shall be relieved from the provisions of section 4 of this part and may be published in tariff supplements of the kind ordinarily authorized in general increase proceedings.

"(c) The Commission shall within sixty days from the date of establishment of interim rates under paragraph (4)(b) of this section commence hearings for the purpose of making the final rate determination. The Commission shall then proceed to make such final rate determination with the carrier having the burden of proof. In making such determination, the Commission may take into account all factors appropriate to ratemaking generally under part I of this Act and shall determine such final rates under the standards and limitations applicable to ratemaking generally under part I of this Act. If the increases in rates finally authorized by the Commission are less than the increases in rates initially made effective, the carrier or carriers shall, subject to such tariff provisions as the Commission shall deem sufficient, make such refunds (in the amount by which the initially increased rate collected exceeds the finally authorized increased rate) as may be ordered by the Commission plus a reasonable rate of interest as determined by the Commission. Nothing contained in this paragraph shall limit or otherwise affect the authority of the Commission to

authorize or to permit to become effective any increase in rates other than the increases herein specified.

* * * * * * *

"(c) Any increased freight rates authorized shall not exceed a reasonable level by types of traffic, commodities, or commodity groups and shall preserve existing market patterns and relationships and present port relationships by increase limitations within and between the major districts to the extent possible without authorizing unreasonable increases in any district."

APPENDIX B

RAILROAD RATE INCREASES—ICC adopts new procedures governing petitions for increases in rates to offset increases in taxes related to the Railroad Retirement Act.

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B—PRACTICE AND PROCEDURES
PART 1107—REQUIREMENTS AND PROCEDURES RELATING TO RAILROAD RATE ADJUSTMENT ACT OF 1973

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 27th day of July, 1973.

EX PARTE NO. 298

REQUIREMENTS AND PROCEDURES RELATING TO RAILROAD RATE ADJUSTMENT ACT OF 1973

Upon consideration of the record in the above-captioned proceeding, including the notice of proposed rulemaking and order served on July 9, 1973, and published in the Federal Register on July 10, 1973, inviting the filing of statements of verified facts, views, or arguments; and of the statements received in response from the parties listed in appendix A hereto; and

It appearing, That a review of all the statements received is convincing that the proposed requirements and procedures set forth in the notice of proposed rulemaking and order should be modified as reflected below;

Wherefore, and for good cause:

It is ordered, That the following procedures be, and they are hereby, prescribed under the authority of Public

Law 93-69, the Railroad Rate Adjustment Act of 1973 [49 U.S.C. § 15a(4)], and that they shall become effective on August 1, 1973.

PART 1107 - REQUIREMENTS AND PROCEDURES RELATING TO RAILROAD RATE ADJUSTMENT ACT OF 1973

Sec.

§ 1107.1 Requirements.

Petition or petitions filed by class-I line-haul railroads and other[a] common carriers subject to part I of the Interstate Commerce Act under the provisions of subsection (4)(a) of section 15a of the act, for adjustment of their interstate freight rates when increases in the expenses of such carriers have or will result from any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as the result of the enactment of the Railroad Retirement Amendments of 1973, shall be verified and shall disclose:[1]

a. The amount of increases in expenses of such carriers resulting from any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973, by showing—

(1) for each of the four calendar quarters ending with the latest quarter preceding the filing date of the petition—

(a) the mid-month number of employees,

(b) the total service hours by operating and other employees, as reported in ICC wage statistics, Forms A and B,

(c) the total compensation paid for operating and other employees, as reported in ICC wage statistics, Forms A and B,

(d) the total compensation subject to retirement taxes,

(e) the retirement taxes paid,

(f) the retirement tax rate,

(g) the retirement taxes reimbursed by AMTRAK and other public authorities.

(2) for the third and fourth quarters of 1973 and for each quarter of 1974—

(a) the estimated mid-month number of employees,

(b) the estimated total service hours by operating and other employees, as reported in ICC wage statistics, Forms A and B,

(c) the estimated total compensation paid for operating and other employees, as reported in ICC wage statistics, Forms A and B,

(d) the estimated total compensation to be subject to retirement taxes,

(e) estimated retirement taxes to be paid,

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[a] corrected by notice served August 14, 1973.

[1] The data furnished should be individually by carriers, summarized by district, and nationwide; the methods used to derive the estimates must be reflected, including assumptions used; and all underlying work papers must be made available to the Commission upon request.

(f) estimated retirement tax rates,

(g) the estimated retirement taxes to be reimbursed by AMTRAK and other public authorities and, in addition,

(h) the estimated dollar amount of tax increases resulting from the increased tax rates.

b. The dollar amount of increased freight rates needed by showing—

(1) for each of the four calendar quarters ending with the latest quarter preceding the filing date of the petition—

(a) the freight revenue ton miles,

(b) the freight revenues.

(2) for the third and fourth quarters of 1973 and each quarter of 1974— [b]

(a) the estimated freight revenue ton miles,

(b) the estimated freight revenues based on rate levels in effect at the time of the filing of the petition, and

(c) the estimated freight revenues to be obtained from the increases proposed, including the effect on the movement of the traffic.

c. Specify proposed rate holddowns and exemptions by individual roads and districts with reasons for such exceptions and effect on estimated freight revenues.

d. The availability of means other than a rate increase by which carriers might absorb or off-set such increases in expenses, identifying the means considered.

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[b] corrected by notice served August 3, 1973.

§ 1107.2 Notice.

Notice of the filing of such a petition will be given to the general public by publication of such a notice in the Federal Register.

§ 1107.3 Commission order.

Upon consideration of the evidence presented in such a verified petition, and in accordance with the provisions of subsection (4)(b) of section 15a, within 30 days of the filing of the petition, the Commission shall issue an order (1) permitting the establishment of interim increases in the general level of the interstate rates in an amount approximating that needed to offset the increases in expenses attributable to the increases in taxes referred to above, (2) requiring the publication in the tariffs establishing the interim increase of a rule requiring the carriers to pay refunds, with interest at the rate of 4 percent per annum, to the extent that the increase ultimately approved under the provisions of subsection (4)(c) of section 15a is less than that approved on an interim basis, (3) requiring publication of the said order in the Federal Register, and (4) providing for notification to this Commission by all persons who are interested in participating in the subsequent hearings to be held under the provisions of subsection (4)(c) of section 15a.

It is further ordered, That notice of this order shall be given to the general public by depositing a copy in the office of the Commission's Secretary and by filing a copy with the Director, Office of the Federal Register, for publication in the Federal Register.

This is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Appendix A to order in Ex Parte No. 298

VERIFIED STATEMENTS

Railroad respondents
Institute of Scrap Iron and Steel
Puget Sound Traffic Association
Southern Hardwood Traffic Association and Associated Cooperage Industries of America, Inc., jointly
Western Wood Products Association, California Redwood Association, Western Wood Preservers Institute, and Western Plywood Manufacturers' Traffic Conference, jointly
Swift & Company and Swift Chemical Company, jointly
Glass Container Manufacturers Institute, Inc.

STATEMENT OF VIEWS

The National Industrial Traffic League
Carolina Power & Light Company, Duke Power Company, South Carolina Electric & Gas Company, and Virginia Electric and Power Company, jointly
Consumers Power Company
General Mills, Inc.
Producers Grain Corporation
Pacific Northwest Traffic League
Weyerhaeuser Company
California Grape & Tree Fruit League
Monsanto Company
Roberta Simons
Canners League of California.

APPENDIX C

The Fertilizer Institute points out that under the carriers' proposal, the eastern district carriers will receive only $4,747,383, as against an estimated tax increase of $16,418,716. It adds that while a shortfall by the eastern carriers of roughly 400 percent is hardly consistent with what Congress intended, an even more serious problem is presented in the case of the southern district carriers. Against a revenue increase of $9,273,727, the southern carriers project a tax liability of only $1,672,104. It contends that such a windfall is wholly unacceptable. Ideally, the Institute would prefer that the Commission not only undertake the clearing house function, but require the immediate payment of the increase by the collecting railroad into an escrow or trust fund account. However, the Institute recognizes the Commission's staffing problem and supports utilization of the AAR to act as a clearing house with responsibility for insuring that the overages resulting from the increase are transferred to the underprovided roads.

The carriers [1] in favor of the plan contend (1) that the record does not support the claim that the overprovided railroads make a greater contribution to capital spending than do the underprovided railroads; (2) that variances in

[1] Robert W. Meserve and Charles W. Bartlett, Trustees of the Property of Boston and Maine Corporation, Debtor

Chicago, Rock Island and Pacific Railroad Company

Thomas F. Patton and Ralph S. Tyler, Jr., Trustees of the Property of Erie Lackawanna Railway, Debtor

John F. Nash and Robert C. Haldeman, Trustees of the Property of Lehigh Valley Railroad Company, Debtor

George P. Baker, Richard C. Bond and Jervis Langdon, Jr., Trustees of the Property of Penn-Central Transportation Company, Debtor

Andrew L. Lewis, Jr., Trustee of the Property of Reading Company, Debtor

financial results of carriers are due to the locality, traffic mix, geography, routes and differing labor costs resulting from the foregoing factors and differing rates of pay and number of crews involved between common points; (3) that the relative efficiency of the carriers is no reason for permitting the overprovided lines to reap a profit from the Ex Parte No. 299 increase; (4) that the purpose of the Railroad Rate Adjustment Act of 1973, would not be achieved if some lines receive a bonanza of more than their increased retirement tax costs, while other lines receive substantially less than their increased costs; (5) that the shortfall in 1974 for the six bankrupt Northeastern carriers is estimated at almost $12 million; (6) that, for example, a 2.7-percent increase for 1974 would yield an excess of over $23 million for 27 carriers and a shortfall of over $26 million for 35 carriers; (7) that the shifting of over $26 million in overprovided funds out of approximately $390 million produced under the Ex Parte No. 299 increase will not affect railroad management decisions or inhibit the incentive of railroad management to operate in the most efficient manner; and (8) that the Commission need not rely on the section 5(1) pooling provision, but on amended section 15a and condition the approved rates on the carriers acceptance of procedures, which assure that the revenues go to railroads in proportion to their increased railroad retirement tax obligation.

It is the position of the opponents of revenue pooling (1) that the Commission does not have the jurisdiction to compel the railroads to pool or redistribute any revenue in excess of the increased retirement tax received from the freight rate increase; (2) that revenue pooling would be (a) unfair to the carriers which must give up the revenue, (b) impossible to administer, and (c) potentially self-defeating.

The opponents[2] contend (1)(a) that variations among individual railroads are the result of differences between railroads in their ratios of taxable payroll to freight revenues; (b) that railroads which have higher taxable payrolls have relatively more employees; (c) that the variations are the result of deliberate management policies regarding capital investment and maintenance expenditures, labor protection and the conditions under which a railroad is constructed and operated. They explained as follows: "First, there is an important trade-off between labor costs and capital investment which pervades the railroad industry. For example, some lines will adopt a management policy of more frequent replacement of cars and locomotives, while holding back on repairs during service lives; other lines adopt a policy of patching and maintaining, while minimizing capital investment, but with correspondingly greater labor costs as a result.

Decisions will be made as to whether to overhaul locomotives and freight cars, or to trade in or scrap, and purchase new ones. Some roads may have a limit on repairs of $5,000 for a particular type of locomotive or car; other roads, which have inclined towards the purchase decision, will have a limit of repair of $2,000. Clearly, the lower repair limit tends to reduce labor costs. Also, the replacement of older rolling stock with more modern and efficient equipment produces a further savings in maintenance expenses.

This inverse relationship in capital investment and labor expense is one of the major reasons for differences in labor expense ratios among the various lines. It enters

[2] All respondents in southern territory, all in western territory, except the Chicago, Rock Island and Pacific Railroad Company and in eastern territory only the Norfolk and Western Railway Company and the Chessie System comprised of the affiliated Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company and Western Maryland Railway Company.

every office and every yard, and is in the background of decisionmaking at all levels.

Second,

Some railroads have been saddled with excess labor costs as the result of protective agreements reached in merger proceedings. The most significant point, at least in the case of Penn-Central and other railroads which have made substantial concessions to labor in order to facilitate their mergers and other consolidations, is that this was a deliberate management decision which involved the calculated risk of excess payroll. The potential liability of excess labor capacity and inflated payroll is presumably weighed against such merger benefits as increased traffic solicitation power, consolidation and elimination of excess plant, and more efficient management. Furthermore, excess payroll is normally expected to decline by attrition.

The opponents further urge (1) (a) that the uniform increase comes very close to offsetting the full retirement tax increase; (b) that to achieve a precise offset, the amount of the general increase would have to be raised 0.25 percent in the East, lowered 0.32 percent in the South and lowered 0.10 percent in the West; (c) that in the case of Penn-Central's shortfall, an increase of 0.46 percent would be necessary, and might be a sufficient basis to further increase all the rates; (2) (a) that to require pooling would amount to punishing efficiency and rewarding inefficiency; (b) that revenue pooling would be a direct and immediate discouragement to capital investment in the Nation's railroad industry; (3) (a) that the roads which are able to carry more of the rate increase through to net income make a greater than average contribution to the industry's capital spending; (b) that such roads made capital expenditures during 1968-1972 that were 40 percent greater in relation to their property investment than did the others; these roads spent $3.7 bil-

lion for additions and betterments equivalent to 20.5 percent of their $17.9 billion property investment, while the other roads spent $2.8 billion or 14.6 percent of their $19 billion investment; (c) that the "surplus" roads had acquired 49.2 percent of the total car fleet as of December 31, 1972, but they installed 55.2 percent of the new cars during the 1963-1972 decade, or stated another way, these roads acquired new cars in numbers equivalent to 42.6 percent of their ownership, while the other roads installed only 30.5 percent of theirs; (d) that such spending for freight cars and other capital improvements provides both direct and indirect benefits for all railroads and thereby tends to eliminate what the Commission referred to in its interim report as inequities or variations; and (4) that in addition to accounting problems, the constantly changing traffic patterns would render obsolete any settlement as soon as the underlying data changed.

Southern Railway submitted a memorandum of law, contending that the suggested pooling plan is unlawful. Chessie System indicated that in order to avoid any excess, each carrier would probably resort to rate reductions. A witness for the Norfolk & Western indicated that if the Commission required a polling [*sic*] of excess funds, he "would see to it that there weren't any excess funds."

In addition, the opponents of the plan assert (1) that revenue pooling would be inconsistent with the legislative history of the Railroad Rate Adjustment Act of 1973, which act was not intended to provide a panacea for the ills facing certain of the northeastern railroads, or to alter radically the principles employed by the Commission in considering general increase proceedings; (2) (a) that section 15a(4)(c) permits the Commission in making the final rate determination, to "take into account all factors appropriate to ratemaking generally under part I of this act, and shall determine such final rates under the standards and limitations applicable to ratemaking generally

under part I of this Act;" (b) that it is fair to inquire whether revenue pooling is normally utilized in "ratemaking generally;" (c) that in cases in which rates for individual commodities and services are increased, the Commission has recognized that the carriers' cost justification must be based on the average costs of the participating lines, even though for geographical or other reasons, some roads may have lower costs than others; (d) that the desirability of uniformity in rate increases was recognized by the Commission in Ex Parte No. 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 290, 309 (1972) as follows: "we must consider the needs of the carriers as a whole, or at least by major territorial groupings;" (3) (a) that revenue pooling has been tried and rejected by Congress and there is no jurisdiction to compel it under the Interstate Commerce Act; (b) while that Act did at one time contain provisions for sharing of railroad revenues, these provisions were long ago repealed; (c) that subsequent proposals to empower the Commission to compel revenue pooling have been explicitly rejected by Congress; and (d) that the present pooling provisions of the Act specifically state that the Commission may "approve and authorize" such an arrangement, "but only if assented to by all the carriers involved."

The Southern Governor's Conference and Southeastern Association of Regulatory Utility Commissioners, intervenors, representing the States of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia, oppose the proposed pooling plan and any similar plan which would upset the principle of uniformity and equality of freight rates between different sections of the country dating back to the landmark decision of the United States Supreme Court in *New York* v. *United States*, 331 U.S. 284 (1947) in which the Court upheld an order of the Commission which had struck down as unlawfully discriminatory, the

class rate structure under which railroad rates had consistently been higher in the South than in the North, and southern shippers had been compelled to pay substantially higher prices to reach northern markets than northern shippers were paying to reach southern markets; even where the distances involved were identical. Intervenors strongly urge (1) that the pooling plan, (a) files [*sic*] in the face of the principle enunciated in *New York* v. *United States, supra*, (b) could reverse the progress made by the South since it was handed down, and (c) by shifting large amounts of revenue from railroads in the South to those in the North would bring about precisely the same discriminatory effect upon southern shippers and southern industries, which the Supreme Court previously condemned. They also agree with the position taken by the other opponents that the pooling plan is not contemplated by amended section 15a, would reward inefficiency, and that the solution for the northeastern railroads is in the Regional Rail Reorganization Act of 1973, not these proceedings.

LIRR contends (1) (a) that the basic presumption of those opposed to pooling is that if one carrier has less employees (and hence, less additional tax expense) in relation to its revenues, it is automatically more efficient than one with more employees and thus, should be rewarded for its efficiency; (b) that on interline and interplant shipments, the shipper and receiver may be patrons both of windfall and shortfall carriers; (c) that on all prepaid interline shipments originating on the N & W and Southern, and on all collect shipments terminating on those lines, those carriers collect from their patrons and transfer part of the funds to the other participating lines as their divisions—the only difference under a pooling arrangement would be that the additional surcharge would be subject to different "mini-divisions;" (3) (a) that the lower ratio of additional tax expense to revenues of some of the "windfall" roads is at least in part, attributable

to the favorable divisions received by such lines on interline shipments; (b) that for almost 20 years, the northeastern lines have been trying to get more equitable divisions on north-south traffic, but due to the complexity and time-consuming nature of divisions cases, they have been unable to do so, and in the interim, many of the northeastern railroads have been forced into bankruptcy; and (c) that the fact that the divisions of some of the credit carriers are too high does not entitle them to receive further unjustified "windfalls;" (4) that the "efficiency" of some of the more profitable railroads is not due so much to the caliber of its management, as to other factors such as traffic consist, territory served, et cetera; (5) (a) that if Congress intended that another general freight rate increase proceeding where the more prosperous roads benefit from the added costs incurred by the poorer or bankrupt lines, it could have done so by requiring the Commission promptly to approve a general increase, without enacting a new section 15a(4); (b) that if, as the statute specifically requires, each carrier has the burden of proving that the additional revenues received are necessary to offset *its* additional tax expense, it would not only be "inequitable," as the Commission stated in its interim report and order, but also unlawful, for the "windfall" carriers to keep the unjustified excess; (6) (a) that it is clear that under section 5(1), the Commission cannot require a carrier to participate in a pooling or division of revenues without its assent; however, the Commission can, and should make such an arrangement a condition to its approval of the permanent increase; (b) that such an arrangement does not violate the strictures of section 5(1) since the nonassenting carriers are not being required to participate in the revenue-pooling; and (c) that if, however, such a substantial number of railroads do not assent to a pooling agreement so as to make this method unworkable under present law, the Commission should ask Congress to amend subparagraph (c) of section 15a(4)

by adding at the end thereof a new sentence reading as follows: "Notwithstanding the provisions of section 5(1) of the Interstate Commerce Act or any other provision of law, the Commission may, after hearing, require, with or without the consent of the involved carriers, the pooling and division of revenues produced by any freight rate increase or surcharge authorized or prescribed by it pursuant to the provisions of this section, so as to enable each railroad to recover sufficient revenues to offset such railroad's increased railroad retirement tax expense."

APPENDIX D

Environmental threshold assessment survey

EX PARTE NO. 303

INCREASED FREIGHT RATES AND CHARGES, 1974, NATIONWIDE

EX PARTE NO. 299

INCREASED FREIGHT RATES AND CHARGES TO OFFSET RETIREMENT TAX INCREASES—1973

I. *Introduction.*—On January 7, 1974, substantially all of the Nation's railroads and certain other carriers having joint rates with such railroads filed schedules of increased rates and charges in Ex Parte No. 303, *Increased Freight Rates and Charges, 1974, Nationwide* (hereafter Ex Parte No. 303) requesting a general rail freight rate increase of 5 percent.[1] The Commission by order dated February 20, 1974, ordered the suspension of the requested increase as originally filed but further authorized the affected carriers to cancel the 5-percent increase and thereafter to file and post an increase in rates and charges not to exceed 4 percent. Tariffs reflecting the 4-percent increase were subsequently filed with the Commission, with said increase authorized to take effect on an interim basis. In view of the pendency of Ex Parte No. 295 (Sub-No. 1), *Increased Freight Rates and Charges, 1973—Recyclable Materials* [Ex Parte 295 (Sub-No. 1)], the interim increase for recyclable materials was not authorized. Under applicable provisions of the Interstate Commerce Act, the Commission also instituted an investigation concerning the lawfulness of the requested increase with an order and report addressing this issue anticipated

[1] The carriers in the South only requested 4 percent.

on or before December 5, 1974. This order, based on the merits in the proceeding and the just and reasonable nature of the proposed increase, *may* grant the increase on a permanent basis, deny the increase either in total or in part, require holddowns for specified commodities, or attach conditions to the increase as the Commission may deem warranted.

In Ex Parte No. 299, *Increased Freight Rates and Charges to Offset Retirement Tax Increases—1973* (Ex Parte No. 299), an increase in rail freight rates and charges totaling 2.8 percent to offset expected increases in taxes under the Railroad Retirement Tax Act, as amended, was requested by the Nation's railroads and subsequently authorized on an interim basis by the Commission. Unlike the Ex Parte No. 303 proceeding recyclable commodities were not exempted from the interm increase. In addition, section 15a(4)(c) of the Interstate Commerce Act provides that in handling retirement tax increase proposals, the Commission shall within 60 days from the establishment of interim rates commence hearings for the purpose of making the final rate determination. There is no outside time period within which the Commission must act before any suspended rates are automatically authorized on an interim basis.

Because the final order and report for the two proceedings probably will be issued within a short time of each other, the "major Federal action" analyzed in this threshold assessment survey, or TAS, will encompass both the proposed 2.8-percent general freight rate increase involved in Ex Parte No. 299 and the proposed 4.0-percent general freight rate increase involved in Ex Parte No. 303.[2] It should be emphasized that the two proposed rate

[2] While the 5 percent sought originally in Ex Parte No. 303 by the eastern and western railroads plus the 2.8 percent in Ex Parte No. 299 equals 7.8 percent, in view of the 4 percent authorized as an interim we have decided to consider 6.8 percent as the proposed

increases constitute separate and distinct proceedings before the Commission. Accordingly, the decisions on the merits of the increases may authorize both in whole or in part or may deny both. It is also possible that one increase may be granted and the other denied.

It should be noted here that this TAS addresses but one area of the Commission's decisionmaking process: namely the potential environmental impacts associated with the proposed increase. It is not intended in any way to decide the relative merits of the proposals as they relate to the economic benefits accruing to the various parties to the proceedings or the Commission's overriding interest in furthering the national transportation policy. No value judgments will be presented either as to the participating railroads' financial need for revenues which they will obtain if the final increases are approved by the Commission, or with respect to the systematic and finetuned balancing of the economic and technical issues involved with the environmental ramifications of the *Ex Parte* increases. These matters are more properly pertinent to the ultimate adjudication of the proceedings based upon the developed evidence of record and as such are beyond the scope of this assessment. By limiting this assessment solely to environmental issues, the concomitant analysis will not prejudice the interests of the affected parties.

II. *Environmental Impacts.*—The environmental impacts associated with general rate increases evolve around two distinct areas: that is, (a) the extent, if any, the increases tend to divert freight traffic currently handled by the participating railroads to alternative modes of transportation,[3] and (b) the extent, if any, the increases

increase. The results would have been the same, however, had the Commission considered 7.8 percent as the proposed increase.

[3] Diversion refers to total rail movements nationwide, without specific reference to particular commodities, geographic locations, shippers, or rail carriers (See discussion, below).

tend to inhibit or reduce the movement and consumption of recyclable commodities.[4] These issues are not unique to the instant proceedings. Rather, they were extensively explored in the following Commission proceedings:

Ex Parte No. 295, *Increased Freight Rates and Charges, 1973*, 344 I.C.C. 589 (1973)—a 3 percent general increase authorized by order and report dated November 16, 1973. Environment considerations were analyzed in Appendix A of the referenced report.

Ex Parte No. 295 (Sub-No. 1), *Increased Freight Rates and Charges, 1973—Recyclable Commodities*—a proposed 3 percent increase for recyclables, the environmental impacts of which were analyzed in a final EIS served October 31, 1974.

Ex Parte No. 270 (Sub-No. 5), *Investigation of Railroad Freight Rate Structure—Iron Ores*, and Ex Parte No. 270 (Sub-No. 6), *Investigation of Railroad Freight Rate Structure—Scrap Iron and Steel*—a comprehensive analysis of the rate structure for iron ore and scrap iron and steel, the environmental impacts of which were analyzed in a final EIS served August 2, 1974.

The discussion following relies heavily on the analysis and conclusions in the above-referenced proceedings, albeit in a summary fashion, and will primarily focus on identifying the pertinent areas of environmental concern. In order to satisfy the requirements of section 102(2)(C) of the NEPA, these areas will be evaluated with respect to their environmental significance or nonsignificance using as a reference the bipartite test suggested in *Hanley* v. *Kliendienst*, 471 F. 2d 823 (2d Cir., 1972), wherein the court stated as follows:

"* * * the agency in charge, although vested with broad discretion, should normally be required to review the

[4] As will be addressed more fully below, possible reductions in the movement and consumption of recyclables may indirectly affect energy consumption, emission, use of finite resources, etc.

proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effect of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected areas."

Furthermore, in order to fulfill the more general mandate inherent in NEPA that environmental concerns should be an integral part of the Commission's decisionmaking process, the analysis hereby presented will be duly considered along with the more traditional elements of the national transportation policy in any final decision in the instant proceedings.

A. *Traffic Diversion.*—Certain protestants to the subject proceedings suggested that a diversion of freight from rail to motor carriers in response to an authorized rate increase is no myth. Should a diversion actually occur, it is generally accepted that there will be a degradation in the overall quality of the human environment. When a comparison of truck versus rail use is based on emissions per gallon of fuel consumed, the two modes are fairly compatible, as depicted in the table below:

Transportation Source Air Emissions (gm/gal.)

Pollutant	Truck [1]	Locomotive [2]
Carbon Monoxide	102.0	59.0
Hydro-carbon	17.0	42.5
Nitrogen Oxides	170.0	167.0
Particulate	6.0	11.0.
Sulfure Oxides	12.0	25.4

Source: "Compilation of Air Pollutant Emission Factors, Second Edition," U.S. Environmental Protection Agency.

[1] Based on gross vehicle weight of 30 tons and fuel consumption of 5 miles/gallon.

[2] Composite data.

This relative parity breaks down, however, when energy or fuel consumption is considered. That is, for intercity freight, truck freight consumes 2800 Btu/ton mile compared to 670 Btu/ton mile for railroad traffic.[5] Assuming both modes use comparable grades of diesel fuel, the former requires more than four times the fuel utilization to haul an equivalent amount of traffic; and, therefore, the relative emissions per gallon should be adjusted accordingly.

This is not to say that in all instances rail transportation is more environmentally efficient at least from an air pollution point of view. There are situations, for example, where rail service to a point at the end of a branch line is provided on an "as needed" basis. This may entail running a power unit designed to haul 100 or more cars up the branch line and back again to the connection with the main line to pick up but one or two carloads of freight. The massive energy required to operate power units pulling well below their design capacities presents diseconomies with respect to energy consumption and air emissions which could be alleviated if a few, fully-loaded trucks handled the involved freight instead.

It should be noted here, however, that the proposed action is a general rate increase to be applied Nationwide. Given the nature of the proceedings, it would not be practicable or even possible for this assessment to consider isolated situations. This assessment must accordingly rely on the more general propositions concerning the relative efficiencies of rail transportation and the concomitant impacts precipitated by a consummated rate increase.[6]

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[5] Hirst, Eric, ***Energy Intensiveness of Passenger and Freight Transportation Modes 1950-1970***, Oak Ridge National Laboratory, 1973.

[6] A comprehensive study considering the efficiencies of intercity freight traffic was prepared in August, 1971 by the Battelle Co-

While the spectre of diversion has been raised by certain protestants, the record presents no quantification of its extent and character and the Commission is not aware of any competent studies which would indicate that a material diversion would take place. To the contrary, there is evidence that potential diversion would be minimal. The railroad respondents herein have stated that their managements intend to make every effort to maintain the present volume of traffic. They contend that if traffic is in danger of being lost by the railroads to motor or water carriers, appropriate downward adjustments are made in rates to meet the competition. Likewise any loss of traffic because a rate is too high to move a particular commodity would be considered with a view toward reducing the rate and restoring the movement. The railroads feel they must have a substantial volume of movements if they are to spread their high fixed costs over a sufficient number of units to remain competitive. Downward adjustments are regularly made to maintain the volume. An indication of the railroad's philosophy in this regard was expressed by the Vice Chairman and Chief Operating Officer of the Burlington Northern Inc., who stated:

"The increased freight rates proposed in this proceeding will not have any significant influence in diverting Burlington Northern traffic to other forms of transportation. Burlington Northern's policy of continued and thorough surveillance of intermodal competitive factors allows us to act promptly as rate adjustments are necessary to retain traffic. It is also true that other modes of transportation are experiencing cost increases, some of which ultimately will probably be incorporated in increased freight rates for those modes. I do not consider the proposed increase

lumbus Laboratories for the Association of American Railroads, which addressed transportation impacts on air quality, noise, land use, hazardous substances, and chemical usage.

in this proceeding to be a significant factor in diverting our traffic." [7]

Competition from other modes of transportation is based on numerous factors, cost being but one of them. Motor vehicle transportation long has been recognized as offering numerous inherent advantages over rail transportation. *Schaffer Transportation Co.* v. *United States* 355 [*sic*] U.S. 83 (1957). These include speed, flexibility, and the smaller cargo units peculiar to that mode, and the developments of the past decades in these areas have definitely favored truck transportation over rail transportation as a growing medium of intercity carriage. The truckers' ability to effect rapid deliveries has been vastly improved by the completion of much of the Interstate Highway System and the greater speeds that the vehicles operating over it are able safely to achieve and maintain. The ability of trucks to perform prompt door-to-door service has been closely related to the accelerated dispersal of industrial plants and commercial establishments into relatively noncongested suburban and rural areas, often removed from rail lines. Finally, improvements in small containers and demountable truck bodies appear to be infinitely more response [*sic*] to the needs of those shippers who do not ship in quantities sufficient to enable them to tender carloads of freight to the railroads.

To some extent, railroad service itself has been deficient. The Commission's report in *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, at 156, noted a number of areas in which shipper complaints had been numerous and where improvement was imperative, including, particularly, terminal delays, interchange delays, erratic delivery, and deliveries not reasonably timed or spaced. Similarly, the decision in *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264,

[7] Verified Statement No. 6, pp. 11-12, Ex Parte No. 303.

335 I.C.C. 874, affirmed *United States* v. *Allegheny—Ludlum Steel Corp.*, 406 U.S. 742 (1972), called attention to the increasingly unsatisfactory performance of the railroads both in terms of car supply and car utilization. It goes without saying that shippers encountering poor service on the rails are more likely to explore the alternatives and inherent benefits offered by truck transportation, with cost of transportation at times being relegated to secondary status.

A distinction needs to be made here between diversion in the micro and macro sense. For an individual shipper or geographic area accelerating costs of rail transit may precipitate increased usage of motor or water carriers. Also, rail freight rates may place certain industries or areas in a competitive disadvantage which would effectively limit their market range. As the average length of shipment is accordingly reduced, the inherent advantages, of motor carriers may become more pronounced. The net effect of these and other factors will no doubt be to cause some diversion, even in the face of the stated policy of the railroads as mentioned previously to take steps where appropriate to minimize potential diversion. In the micro sense, therefore, diversion will occur and there will be some environmental degradation. Again, quantification of these isolated impacts are not practicable in view of the nationwide implications of the instant proceedings.

In the macro sense, which is more pertinent to the proposed general rate increase, an indication of the scope of possible diversion and its attendant environmental impacts can be gained from reference to total rail freight movements in recent years. Revenue ton-miles for class I railroads in the United States from 1951 through 1973 are depicted in exhibit A. Between 1967 and 1973 rail freight movements have increased from 719 billion ton-miles in 1967 to the record level of 829 billion ton-miles in 1973 (a 15.3-percent increase). This growth was accomplished in the face of a number of general increases

in the general freight rates authorized by the Commission during the 7-year period.

Should the proposed 6.8-percent increase be authorized it is not expected that the growth in traffic will be retarded. To the contrary, the energy shortages experienced in late 1973 are expected to reappear, in this and following years, until the Nation becomes more self-sufficient in energy resources and conservation programs materially slow the historical growth in per capita energy consumption. This may increase the desirability of rail transportation due to its energy advantages over motor carriers and potential shortages of truck diesel fuel which may impede motor carrier movements. Furthermore, it is entirely probable that gasoline and diesel costs will continue their upward spiral. Since motor carriers are relatively energy inefficient the trucking industry will have to bear a greater resource burden which eventually will be passed on, at least in part, to the shipping public. In short, it is conceivable that the energy crisis may create a diversion to the rail carriers thereby effectuating a net improvement in overall environmental quality.

B. *Recyclable Commodities.*—The environmental impact of the proposed actions on recyclable commodities is discussed below for both ferrous and nonferrous metals. Other recyclables are not specifically addressed, but the resultant impacts will be similar in scope in [*sic*] magnitude to those specifically addressed. The analysis applies and extends the methodology developed and used in the final impact statements in Ex Parte No. 295 (Sub-No. 1) and Ex Parte No. 270 (Sub-Nos. 5 and 6). Data on transportation costs have been updated to reflect the current cost of rail transportation.

NONFERROUS METALS

Methodology.—The movement of secondary metals is a function of numerous variables, many of which will oper-

ate to increase or decrease recycling potential independent of transportation costs. To arrive at the best estimate of the impact from a change in rail freight rates alone, it is necessary to analyze what the consumption would be in the artificial situation where one variable (cost) is allowed to fluctuate, with all remaining variables being held constant. Price elasticity, or the response of the supply and demand of a commodity to change in cost, provides the mechanism for analysis.

The conditions governing the movement of scrap are such that, in contrast to many items in our economy, it may be considered to be bought and sold in a free market. In standard economic theory, both the amount of a given commodity that will be consumed and its prices are, in a free market, determined by the intersection of the supply and demand curves.

A supply curve represents the cumulative quantity supplied as a monotonic, nondecreasing function of purchase price, reflecting the costs which the producer(s) must bear and the margin necessary to ensure an adequate return on investment and effort. Thus, at some base price, X_0, no amount of scrap can be supplied because no dealer could operate to provide it. At a slightly higher price, x_1, some total amount, y_1, can be supplied because at x_1, some dealer(s) can realize enough gross profit to stay in business to handle that amount of scrap. Less efficient dealers with higher costs will require higher prices to handle scrap.

Conversely, the demand curve represents amount desired as a monotonic nonincreasing function of price, reflecting the fact that, other things being equal, more of a commodity is demanded at a lower price.

Supply and demand curves are shown in Figure 1. A linear (straightline) demand curve intersects the two supply functions at different points, each representing the

amount of scrap that will be consumed at the equilibrium price for the supply conditions reflected by the particular curve.

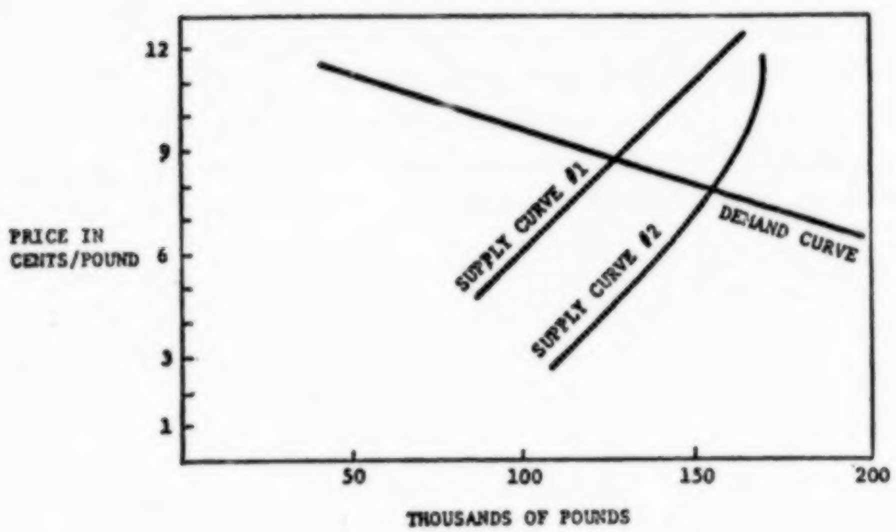
The effect of a change in cost is shown by constructing a new curve in which the price, y_1, of each amount, x_1, of the commodity changes to a new value, y_1'. This situation is shown in Figure 2 where an original supply curve is in effect, moved upwards and to the left. Figure 2 represents, for an entirely arbitrary situation, a "new" and an "old" supply curve intersecting with two different demand curves (both linear).

Supply and demand curves are used to project the anticipated effect which the proposed rate increase will have on the consumption of each of the four major nonferrous metals: aluminum, copper, lead, and zinc.

For aluminum both a supply and demand curve were developed by the mathematical technique of linear regression, in a study performed for the Bureau of Mines[8] by members of the Department of Mineral Economics at Pennsylvania State University. From these results the quantity of aluminum scrap that would be supplied and the quantity that would be demanded can be estimated as functions of price alone, all other variables remaining constant; the changes in consumption accompanying a change in costs and hence in price can be predicted.

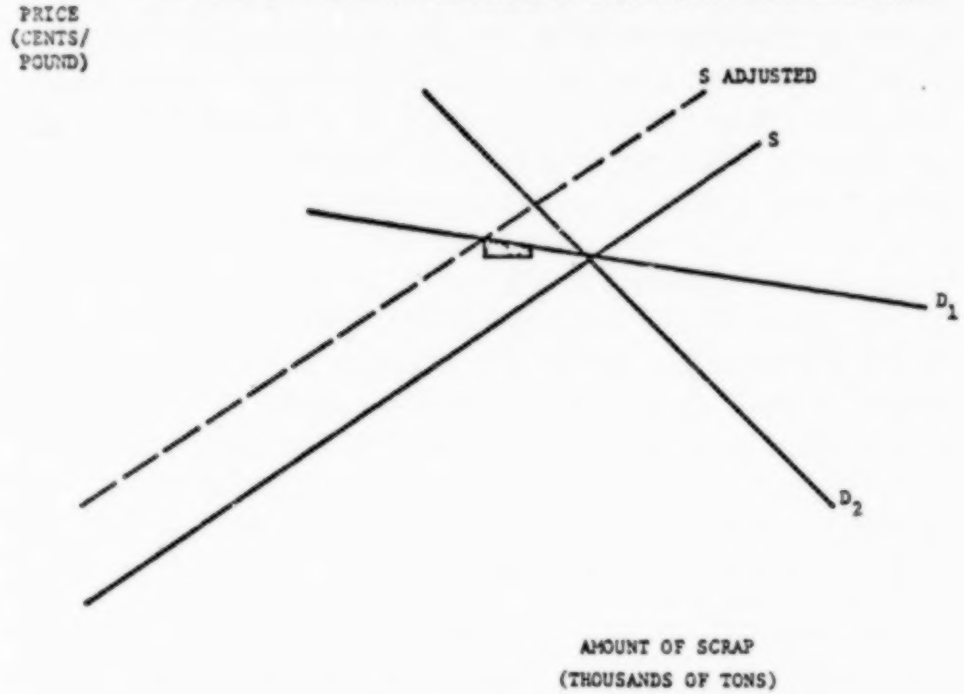
[8] Gordon, R. L., Lambo, W. A., and G. H. K. Schench. 1972. Effective Systems of Scrap Utilization: Copper, Aluminum and Nickel. National Technical Information Center, Springfield, Va.

FIGURE 1
ARBITRARY SUPPLY AND DEMAND CURVES



Derived for the study from general economic theory.

FIGURE 2
INTERSECTION OF ADJUSTED SUPPLY CURVE WITH 2 DEMAND FUNCTIONS



Derived for the study from general economic theory.

For the other three metals, copper, lead, and zinc, it was necessary to develop approximations to supply and demand curves using, in each instance, a single type of scrap as a surrogate for the whole supply. For major classes of scrap metal, both the price paid by the dealer (dealer's price) and the price received by the dealer (wholesale or smelters' price) are available for recent years as periodic averages. This spread between dealer and smelter price was taken to represent the total margin which the dealer has available to cover his costs (including transportation) in furnishing scrap to the processors. Thus, below the minimum price differential the amount of scrap furnished approaches zero, and the maximum price differential was considered adequate to cover the costs of providing all the scrap actually consumed, including the last units which could not have been profitably

provided at a lower price. Other assumptions were made in hypothesising [*sic*] a supply curve on this basis. In the absence of accurate data as to the tonnage supplied periodically, it was arbitrarily assumed that in each of M periods, 1/M of the total consumption of copper scrap was purchased. Further, where the average price in each period was given as a range in cents per pound from x to x + r, it was considered that 1/2M of the total scrap was transacted at the lower price and 1/2M at the higher rate. When each such increment or difference between the average dealer's and ingot makers' price was added to the average dealer's price for the year, a set of points was obtained representing the cumulative percentage of total scrap supplied as a function of price. By plotting a smooth curve to join these points, a surrogate supply function was obtained.

The demand model was developed on the assumption that there are practical limits on the minimum and maximum amounts of scrap that could be consumed. In any given year, the maximum amount of scrap that would be purchased regardless of price is essentially set by the total metal consumption that can be supplied out of secondary material plus small amounts that can be stockpiled.

At the opposite end of the demand scale, the minimum demand for secondary metal tends to be set by the excess of total consumption over the capacity for domestic production from virgin ores. It is hypothesized that at least this amount of scrap would be purchased from United States sources at a price less than that at which imported scrap or ingot can be obtained. At a price above that of the competitive source (imports), the demand would tend to taper off, and clearly as the price increases without limit the demand for scrap approaches zero asymptotically. This situation is well represented by a negative and exponential function. As such a function, the demand curve

was regularly defined (through the use of natural logarithms) from the projected maximum limit and from the point of intersection with the supply curve. This latter point (previously defined for the supply curve) represents the total amount of scrap actually consumed in a given year, where the price is defined as the maximum differential between dealers' and smelter price, added to the average dealers' price.

Impact.—The methodology described in the previous section was used to derive the curves used in the Final Environmental Impact Statement (EIS) related to the Ex Parte No. 295 (Sub-No. 1) proceeding upon which the conclusions reached in that EIS were largely based. Since that time, the situation has been modified by granting of a 10 percent rail freight increase to primary but not to recyclable commodities. By slightly advancing the competitive position of scrap metals so as to increase its demand, this rate change has the effect of shifting to the right the demand curves as previously derived. Accordingly, a new basic situation or "base case" is established as the starting point for considering the impact of the pending actions. The base case was derived by using the average ratio of transportation cost to delivered cost for primary aluminum [9] as representative of all nonferrous metal virgin commodities. On this basis, a 10 percent increase in freight rates represents a rise of 0.34 percent in the delivered cost. The demand curve for scrap metals was then assumed to be increased by this amount.

Figures 3 through 6, inclusive, provide graphic representations of the situation for each of the four principal nonferrous metals, using volume figures for 1971, the latest year for which complete data are available. The

[9] Interstate Commerce Commission, Decision on Ex Parte No. 295, table I, p. 34.

supply and demand curves as originally derived for the Ex Parte No. 295 (Sub-No. 1) final EIS appear in the statement [10] represented by linear approximations over the range of primary interest; these curves appear in Figures 3-6 as solid lines representing the quantity supplied (Q_s) and the quantity demanded (Q_d) as functions of price. In the new base case the dashed line representing the adjusted demand curve, Q'_d, is seen intersecting the supply curve at a point indicating a slightly higher rate of consumption for each scrap metal, as expected as a result of increases authorized in Ex Parte No. 305. The projected impact of the pending actions affecting scrap under consideration here—a 2.8 percent rate increase, a 4.0 percent increase, or a 6.8 percent increase from both actions together—is shown by the three points of intersection of new supply curves (adjusted as in the Ex Parte No. 295 (Sub-No. 1), EIS, Section 2.1.4, with an explanation of the mathematics in Appendix B) with the adjusted demand curve. The impact is always to decrease the expected consumption of scrap. For aluminum, the expected effect of any of the rate increases is so small that even in the expanded scale used in Figure 3 the three points of intersection are virtually indistinguishable.

[10] Figures 2-7, 2-11, 2-14 and 2-17. A slightly modified supply curve was derived for zinc from more comprehensive data out of 1974 issues of *American Metals Market.*

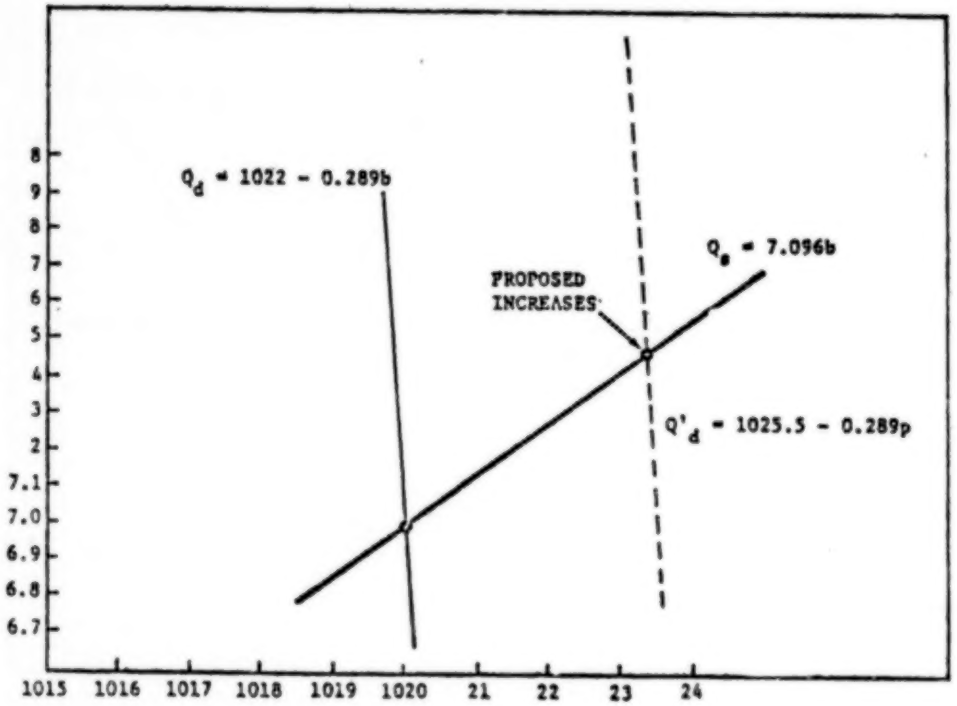


FIGURE 3

ALUMINUM

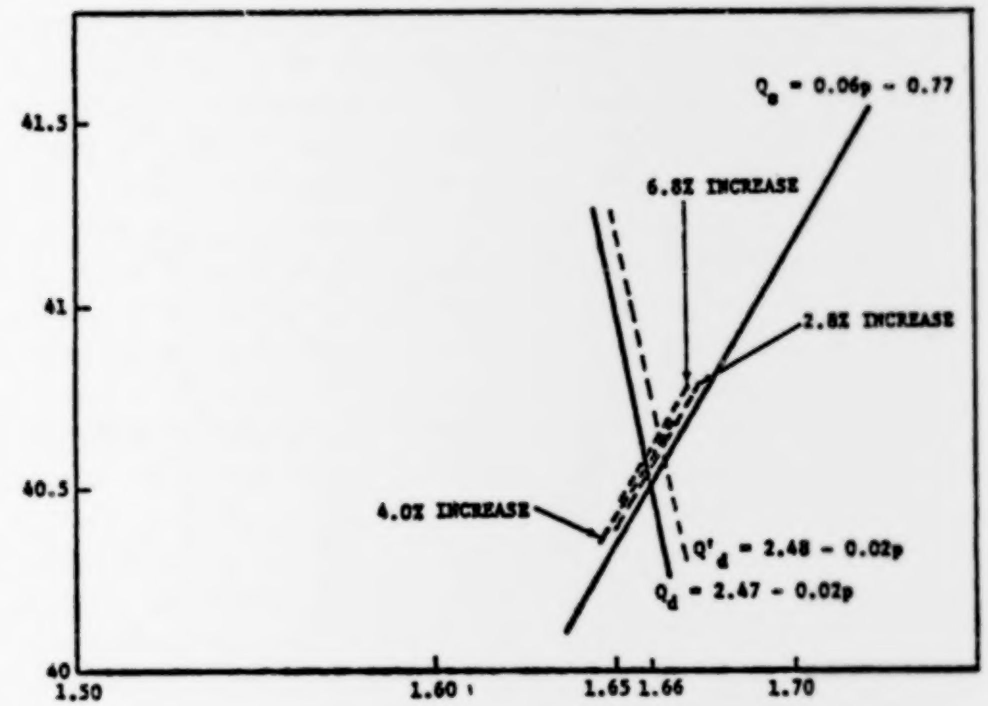


FIGURE 4

INTERSECTION OF COPPER SUPPLY AND DEMAND FUNCTIONS

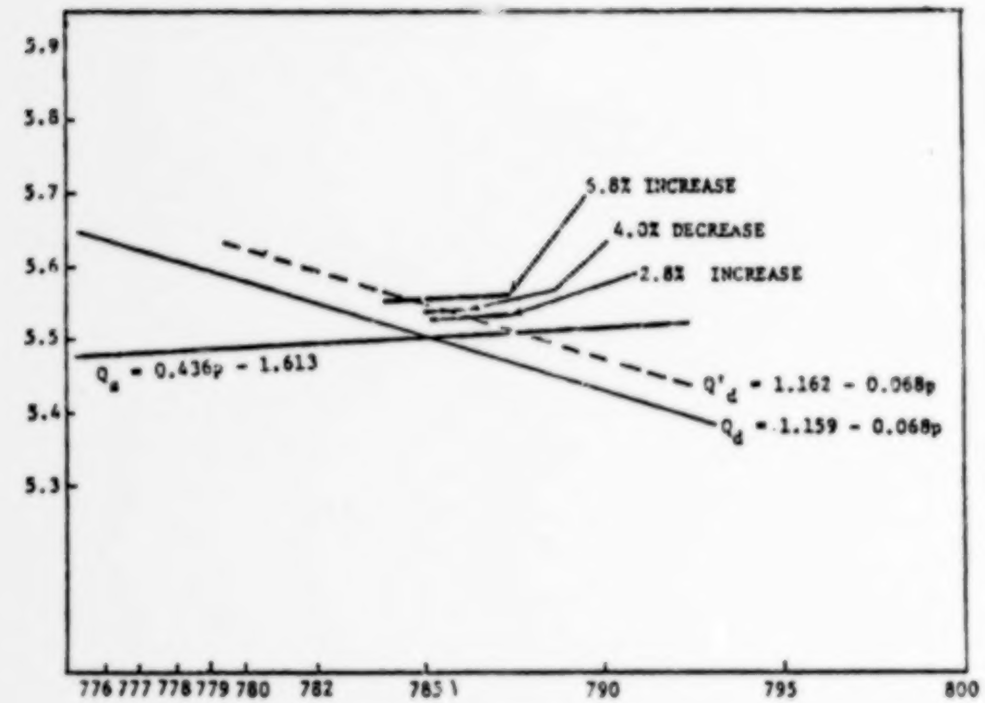


FIGURE 5

LEAD

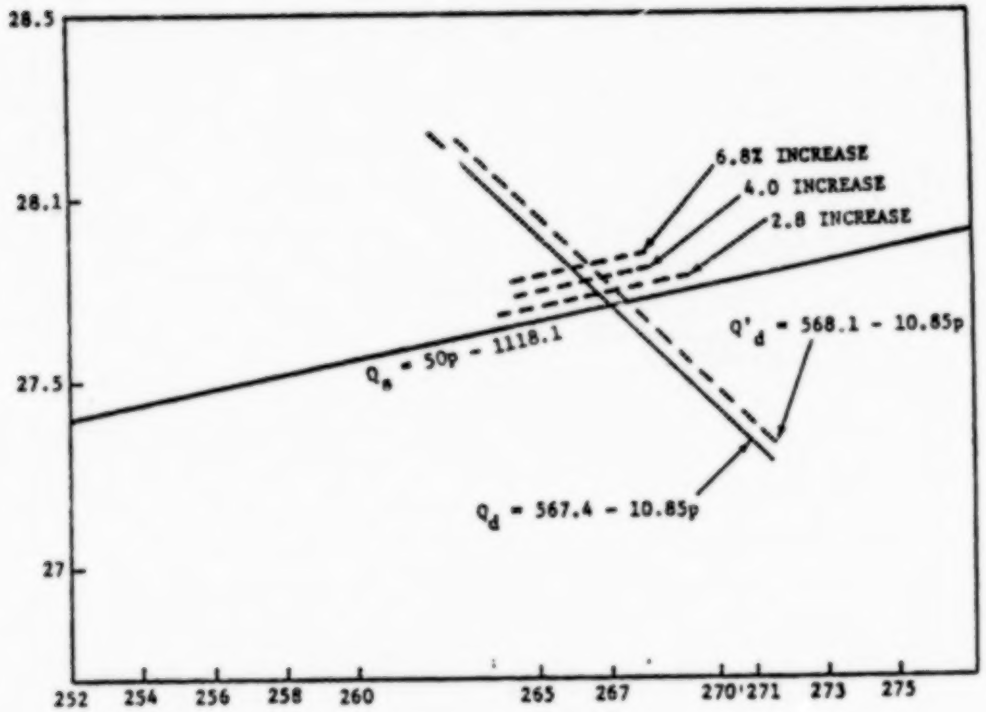


FIGURE 6

SUPPLY AND DEMAND CURVES FOR ZINC

A numerical summary of the results shown graphically in Figures 3 through 6 appears in Table I. For each of the three proposed increases the effect is given in terms both of the reduced tonnage of scrap expected to be consumed and of the reduction as a percentage of the tonnage in the base case. It is seen that in no situation would the proposed rate increase alone (all other factors remaining constant) be expected to decrease scrap consumption by as much as 1/2 of 1 percent of the base case.

No computations were made for nickel because, as noted in the Ex Parte No. 295 (Sub-No. 1) statement, increase in rail transportation rates would not be expected to affect the movement of scrap.

TABLE I

Projected impact of proposed actions

Projected impact			Effect of proposed increases on recyclable commodities					
Nonferrous metal	Initial level of consumption	New base case (expected effect of 10 percent increase on virgin commodities Ex Parte No. 305 tons consumed	2.8 percent reduction in near tons consumed	Percent decrease	4.0 percent reduction in near tons consumed	Percent decrease	6.8 percent reduction in near tons consumed	Percent decrease
Aluminum	1,020,000	1,023,340	< 50	< 0.005	50	.005	< 100	< 0.01
Copper	1,660,000	1,664,000	500	0.03	1,000	0.06	2,000	0.12
Lead	784,600	787,600	1,600	0.20	1,900	0.24	3,100	0.39
Zinc	266,900	267,400	300	0.11	660	0.25	1,000	0.38
Total reduction expected (tons)			2,450		3,610		6,200	

[1] Based on 1971 totals as cited in the EIS. This was the latest year for which complete figures are available.

Table II shows the potential impact of the rate changes in terms of increased consumption of virgin ore and resulting additional power requirements and increased emission of pollutants. Energy rates are derived from the data in Table 2-1 of Ex Parte No. 295 (Sub-No. 1) Environmental Impact Statement and pollutant emissions from Table 2-2 of the same source. Metal yields are derived from the data in Tables 2-4 through 2-7.

Effect on nonmetals.—As regards the other recyclable commodities,[11] the conclusions reached in the Environmental Impact Statement for Ex Parte No. 295 (Sub-No. 1), and summarized in Section 6, that the movement depends on other factors and is essentially insensitive to rail freight rates apply here. The impact of even the combination of a 2.8 percent increase and a 4.0 percent increase in these commodities is deemed negligible.

[11] These commodities along with the STCC codes are as follows:

22 941 Textile Waste garneted or processed
22 973 15 Noils, ramie
22 973 25 Noils (combinings or comber waste), cotton thru
22 973 68 Rovings, jute and istle (ixtle)
32 299 24 Cullet (broken glass)
33 119 Blast furnace or coke oven products, nec.
40 1 Ashes
40 2 Waste or scrap.

TABLE II

Environmental impact of proposed rate increases (nonferrous metals)

Metal	2.8-percent rate increase				4-percent increase				6.8-percent rate increase			
	Decreased consumption		Effect of deriving equivalent metal yield from virgin ore		Decreased consumption		Effect of deriving equivalent metal yield from virgin ore		Decreased consumption		Effect of deriving equivalent metal yield from virgin ore	
	Tons scrap	Metal yield	Power required (10^6 KWH)	Pollutants emitted (tons)	Tons scrap	Metal yield	Power required (10^6 KWH)	Pollutants emitted (tons)	Tons scrap	Metal yield	Power required (10^6 KWH)	Pollutants emitted (tons)
Aluminum---	< 50	39	1.33	0.019	50	40	1.36	0.02	< 100	< 80	2.7	0.039
Copper-----	500	368	0.18	0.9	1,000	736	0.36	1.8	2,000	1,472	0.72	3.57
Lead-------	1,600	1,180	6.55	2.36	1,900	1,400	7.77	2.8	3,100	2,285	12.69	4.57
Nickel-----	0	0	0		0	0	0	0	0	0	0	0
Zinc-------	300	210	2.77	2.93	660	460	6.07	6.42	1,000	700	9.33	9.86
Total-----	2,450	1,797		10.83	3,610	2,636	15.56	11.04	6,210	4,537	25.44	18.04

In regard to nonferrous scrap, none of the proposed actions can be determined to have a significant environmental impact. In all instances, the reduction in movement of recyclables is well below 1/2 of 1 percent. The expected increases in power requirements and in the emissions of pollutants (Table II) resulting from the need to process small additional amounts of virgin metal are correspondingly small. The maximum increases, those that would result from imposing a cumulative 6.8 percent increase in rates on recyclable commodities, are estimated at 25.44 x 10^6 KWH of additional electricity and emission of 18.04 tons of pollutants.

To place these quantities in perspective, over 104 thousand tons of pollutant were estimated to have been discharged in 1970 from primary production of aluminum alone.[12] The kilowatt hours of energy involved are equivalent to approximately 14,300 barrels of oil, whereas approximately 50 times that amount is estimated to have been required just to recycle the scrap zinc reclaimed in 1972 (Bureau of Mines informal figures).

ALTERNATIVES

The principal alternatives pertinent to the possible environmental impacts of the pending actions are:

1. To grant neither of the proposed increases;
2. To grant one while withholding the other;
3. To grant an increase in rates limited to the increase in tariff per hundredweight (cwt) granted to the equivalent virgin material (the so-called "holddown").

In regard to nonferrous metals, the impact expected from granting the cumulative 6.8 percent has been seen to

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[12] Iversen, R.E. 1973 "Air Pollution in the Aluminum Industry." *Journal of Metals*, 25(1):19-23.

be so slight that any environmental gain resulting from withholding either or both of the increases could only be regard [*sic*] as trivial. It is also true that the difference in effect of one proposed increase rather than the other is negligible so that there is little to choose between the two.

Similarly, because of the relative insignificance of the impacts associated with the actions, the "holddown" alternative would provide minimal environmental benefits. This is particularly so when considering that the impacts discussed earlier are predicated upon increases in recyclable freight rates, all else deemed constant. As such, the analysis represents a worst case situation.

FERROUS METALS

Methodology.—The methodology used in the following analysis is based upon the methodology developed and described in the final Environmental Impact Statement in Ex Parte No. 270 (Sub-Nos. 5 and 6) and was based upon an analysis of the Interstate Commerce Commission's 1 percent sample of 1969 waybills. To reflect current transportation charges, the 1969 data was adjusted to account for rate increases requested or approved through Ex Parte No. 305.[13] The updated transportation costs were then modified to reflect changes anticipated as a result of approvals to a rate increase requested in Ex Parte Nos. 299 and 303. The changes in transportation costs due to these actions are used to modify scrap iron and steel supply and demand curves developed by the U. S. Bureau of Mines.[14] The intersection of the supply and demand curves reflects the consumption of scrap. By comparing the con-

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[13] That is, the base case for analysis takes into consideration all general rate increases reflected on table III, with the various exception of the Ex Parte Nos. 303 and 299 proposals.

[14] Adams, R. L., *An Economic Analysis of the Junk Automobile Problem*, U.S. Bureau of Mines, Washington, D.C. 1973.

sumption with or without Ex Parte Nos. 299 and 303, estimates of the change in scrap consumption due to Ex Parte Nos. 299 and 303 can be determined. The change in consumption is then used in conjunction with an environmental model of the steel industry to determine the impact the change in consumption has on the environment.

Impact.—The EIS prepared for Ex Parte No. 270 (Sub-Nos. 5 and 6) addressed only changes in railroad freight rates on scrap iron and steel. Therefore the analysis addressed only shifts in the supply curve. The demand curve was not affected. Ex Parte Nos. 299 and 303 entail requests for increases in all freight rates. As a result, approval of these two requests will have an effect on both the scrap market's supply and demand curve. The supply curve will shift to the left due to increased costs in transporting the scrap to the market place. The demand curve will shift to the right because of increased costs—transporting the raw materials used in producing steel. These shifts are depicted in Figure 7. An across-the-board increase in freight rates results in the supply curve moving from S_1 to S_2 and the demand curve moving from D_1 to D_2. As a result of the shifts, consumption changes from Q_1 to Q_2.

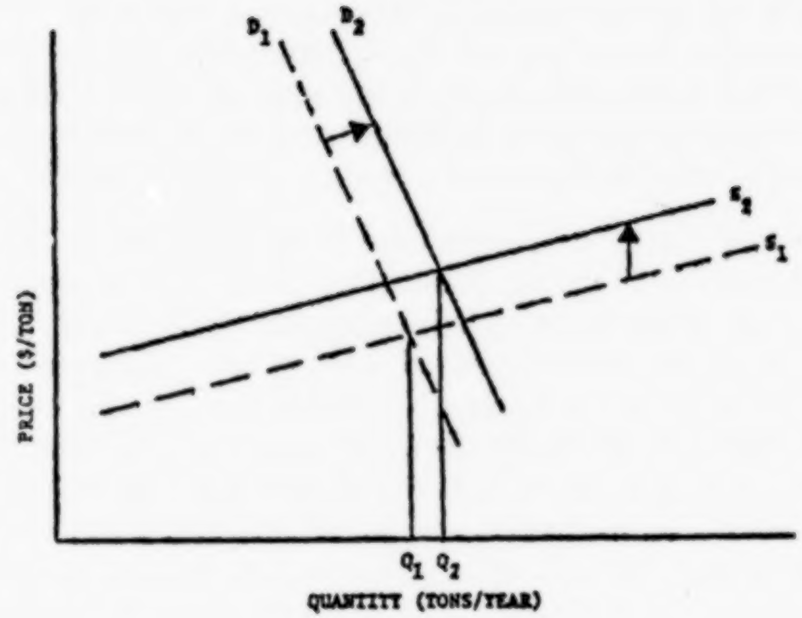

FIGURE 7

SCRAP MARKET SUPPLY AND DEMAND CURVES

The shift in the supply curve is easily determined—it is equal to the increase in transportation rates on scrap iron and steel. However, the shift in the demand curve is more difficult to estimate. It depends on the cross elasticity of raw materials required for steel production and scrap iron and steel. Because no cross elasticity estimates are available, a worse case analysis was conducted. Changes in scrap consumption were calculated for two assumptions (1) cross elasticity is zero, i.e., a change in the price for raw materials has no effect on the consumption of scrap iron and steel and therefore, no shift in the demand curve, and (2) cross elasticity is maximum, i.e., an increase in the cost of raw materials shifts the demand curve by an equal dollar amount.

Because Ex Parte Nos. 299 and 303 are across-the-board increases, an analysis of the impact of increases requires a knowledge of the transportation rates charged

on both the raw materials and scrap iron and steel.[15] Two equivalance formulas, one by Battelle and one by ICC,[16] have been developed to relate the raw material transportation costs to the scrap iron and steel transportation cost. Both equivalance formulas are used in this analysis.

Transportation cost data used in Ex Parte No. 270 was based upon 1969 prices. Estimates of current transportation costs were made by adjusting the 1969 prices to reflect rate increases approved since 1969. These adjustments are shown in table III. Using the Battelle equivalence formula Ex Parte Nos. 299 and 303 will result in an increase of $0.37 in the cost of transporting raw materials for one ton of steel and $0.40 in the average cost of transporting one ton of scrap iron and steel. Using the ICC equivalence formula, the price increase is $0.70 for raw material transportation and $0.40 for scrap iron and steel.

Also shown in this table are the differences in transportation rates along with the difference as a percentage of transportation cost for scrap. Using the Battelle equivalence formula, the magnitude of the difference has decreased since 1969, i.e., $0.95/ton v. $0.45/ton. More important, however, especially during inflationary periods, the difference when expressed as a percentage of the scrap transportation cost has also been decreasing. This percentage was decreasing even when the absolute value was increasing. The percentage figure represents what is happening in terms of constant real dollars, i.e., after adjustments for inflation are made.

[15] Barnes, T. M., and H. W. Lownie, Jr., *A Cost Analysis of Air-Pollution Controls in the Integrated Iron and Steel Industry*, National Technical Information Center, Springfield, Va., 1969.

[16] Interstate Commerce Commission, Final Environmental Impact Statement, Ex Parte No. 281, *Increased Freight Rates and Charges, 1972*. May 7, 1973) [*sic*].

TABLE III

Average transportation charges for materials used in producing steel

	Percent increase on raw material	Percent increase on scrap iron	Battelle				ICC			
			Raw materials	Scrap	Difference	Percent of scrap cost	Raw materials	Scrap	Difference	Percent of scrap cost
1969 (Base)	....	....	3.66	4.51	.85	18.8	6.92	4.51	(2.41)	53.4
Ex Parte No. 262	6	6	3.88	4.78	.90	18.8	7.34	4.78	(2.56)	53.6
Ex Parte No. 265-B	6	6	4.11	5.07	.96	18.9	7.78	5.07	(2.71)	53.6
Ex Parte No. 267-B	12[1]	11[2]	4.60	5.63	1.03	18.3	8.71	5.63	(3.08)	54.7
Ex Parte No. 281-B	5[3]	3	4.83	5.80	.97	16.7	9.15	5.80	(3.25)	56
Ex Parte No. 295-A	3[4]	2[5]	4.97	5.92	.95	16.0	9.42	5.92	(3.50)	59
Ex Parte No. 305	10	....	5.47	5.92	.45	7.6	10.36	5.92	(4.44)	75
Ex Parte Nos. 299 and 303	6.8	6.8	5.84	6.32	.48	7.6	11.06	6.32	(4.74)	75

[1] Except 14 percent in Official and 6 percent in Southern Territory.

[2] Except 6 percent between points within Southern Territory.

[3] Except 4 percent in Southern and 4 percent maximum 22 cents gross ton in Official Territory.

[4] Except 3 percent maximum 22 cents per gross ton between stations in Eastern and between stations in Eastern Territory and Western and Southern Territories.

[5] Effective rate based upon a limitation of 22 cents per gross ton.

These price changes were then used to modify the scrap market supply and demand curves presented in the Ex Parte No. 270 environmental impact statement and determine the change in scrap consumption. Four cases were evaluated:

(1) Base case—no change in rates.

(2) $0.40 shift in supply curve; no shift in demand curve, i.e., cross elasticity equal to zero.

(3) $0.40 shift in supply curve; maximum shift in demand curve based upon Battelle's equivalence formula, and

(4) $0.40 shift in supply curve; maximum shift in demand curve based upon ICC's equivalence formula.

The conditions used in the analysis and the results of the four cases are presented in Table IV. The change in consumption for the cross evaluation of scrap iron and steel ranged from a decrease of 300 thousand tons/year to an increase of 270 thousand tons/year. The decrease resulted when the cross elasticity was assumed to be maximum, the consumption of scrap iron and steel increased when the impact of Ex Parte Nos. 299 and 303 requests were evaluated.

The supply and demand curves used in this analysis were based upon data on scrap price and consumption during the sixties. The resulting equilibrium prices calculated using the model, therefore, are low when compared to the current prices. Current prices for No. 1 Heavy Melting are nearly three times higher than the high grade price generated by the model, and No. 2 Bundles prices are nearly twice as high. Higher prices would tend to decrease the importance of a given change in freight rates since the change would represent a smaller percentage of the total cost as reflected in the market.

TABLE IV

New term purchased scrap for Ex Parte Nos. 299 and 303 transportation rate changes

Conditions	
Steel production	155 million tons/year
Open hearth and electric furnace production	73 million tons/year
Exports	11.6 million tons/year
No change in rates—base case	
Low grade scrap	15.82 million tons/year
High grade scrap	30.91 million tons/year
Total purchased	46.73 million tons/year
Average low grade price	$27.23/ton
Average high grade price	34.32/ton
V., shift in demand curve	
Low grade scrap	15.7 million tons/year
High grade scrap	30.66 million tons/year
Total purchased	46.43 million tons/year
Average low grade price	$25.57/ton
Average high grade price	$34.32/ton
Decrease in consumption	300 thousand tons/year
Battelle equivalence formula	
Low grade scrap	15.82 million tons/year
High grade scrap	31.00 million tons/year
Total purchased	46.82 million tons/year
Average low grade price	$27.58/ton
Average high grade price	$34.61/ton
Increase in consumption	100 thousand tons/year
ICC equivalence formula	
Low grade scrap	15.86 million tons/year
High grade scrap	31.14 million tons/year
Total purchased	47.00 million tons/year
Average low grade price	$27.58/ton
Average high grade price	$34.66/ton
Increase in consumption	270 thousand tons/year

Assuming the cross elasticity is zero, i.e., worst case situation, the 300 thousand ton decrease in annual consumption will have only minimal impact on the environ-

ment. The impact, in terms of percentage change from the base case, for the worst case are shown in table V. The deterioration in environmental quality due to steel production is less than 0.3 percent for the proposed 6.8 percent increase in freight rates.

TABLE V

Percentage change in energy and emission associated with all phases of iron and steel products

Factor	Percent change	Actual change (millions of tons per year)
Energy consumption	0.14	[1] 5.2(10) BTU/Yr.
Particulates	0.21	4.13
Sulfur oxides	0.10	1.38
Carbon monoxide	0.13	....
Hydrocarbons	0.24	....
Nitrogen oxides	0.08	....
Ammonia (in air)	0.25	....
Ammonia (in water)	0.27	0.27
Cyanide (in water)	0.24	0.03
Phenols (in water)	0.22	0.01
Suspended solids	0.16	1.27
Sulfur (in slag)	0.26	....
Slag	0.16	....

[1] Based upon energy consumption estimate provided by Institute of Scrap Iron and Steel, Inc., in Ex Parte No. 303 and Ex Parte No. 299, Comments of Scrap Iron and Steel, Inc. Upon Environmental Threshold Assessment Survey, August 13, 1974.

In regard to ferrous scrap, the proposed actions can not be viewed as having a significant environmental impact. In the worst case situation the reduction in movement of scrap iron and steel is below 0.7 percent. If the worst case situation does occur, the expected increases in power requirements and in emission of pollutants resulting from the need to process small additional amounts of virgin metal are correspondingly small. The increases

are estimated at $5.2(10)^{12}$ BTU/yr of additional energy and emission of 3.5 thousand tons of pollutants.

To place these quantities in perspective, over 2.1 million tons of pollutant were estimated as the annual discharge from the iron and steel industry.[17] The additional energy consumption for the worst case is equivalent to approximately 208 thousand tons of coal, less than 0.04 percent of the 1972 production of coal.

ALTERNATIVES

The principal alternatives pertinent to the environmental impacts of the pending actions are:

1. To grant neither of the proposed increases;

2. To grant one while withholding the other;

3. To grant the increases in rates with increases on recyclable materials limited (the so-called "holddown").

The 2.8 percent increase and the 4.0 percent increase have been shown to be small. Therefore, the impacts resulting from withholding either or both of the increases could only be regarded as trivial. It is also true that the difference in effect of one proposed increase rather than the other is neglible so that there is little to choose between the two.

Similarly, because of the relative insignificance of the impacts associated with the actions, the "holddown" alternative would provide minimal environmental benefits. This is particularly so when considering that the impacts discussed earlier are predicated upon increases in recyclable freight rates, all else deemed constant. As such, the analysis represents a worst case situation.

[17] Based upon data presented in Carmon, N. S., and J. Adams; *Environment Steel—Pollution in the Iron and Steel Industry*, The Council of Economic Priorities. New York, N.Y., 1973, pp. 81-34.

DISCRIMINATION

Just as the spectre of discrimination has consistently been raised as a matter with environmental importance, the Commission just as consistently refuted the argument as being beyond the scope of any environmental analysis. This issue is more properly germane to the economic and financial implications of the rate structure and as such is the subject of the overall investigation in Ex Parte No. 270 (Sub-Nos. 5 and 6) as well as Ex Parte No. 306, *Implementation of Public Law 93-236—Freight Rates for Recyclables*, which was recently instituted by the Commission in response to Section 603 of the Regional Rail Reorganization Act of 1973. P.L. 93-236, 87 87 Stat. 985.[18] The failure of this assessment to address the discrimination issue should not invalidate any conclusions with respect to the environmental significance of a 6.8-percent rate increase.

III. *Conclusions.*—Either or both of the proposed increases, if approved by the Commission, will cause a degree of environmental degradation for some isolated commodities and certain geographic areas as rail transport becomes less competitive with other modes of transportation thereby precipitating a degree of diversion from rail to motor carriers. As applied Nationwide, however, it is not expected that there will be measurable diversion as a direct response to the higher rates. In fact, notwithstanding the increase, there is no indication that total movements of freight by rail will not continue to grow from year to year as experienced in the recent past. Rail transport will no doubt share in the general expansion of the Nation's economy and certain extraneous forces, in particular the recent energy crisis, and expected increased costs and rates experienced by motor

[18] Special rules were adopted by order of the Commission served August 13, 1974, for proceedings in which the elimination of discrimination against the shipment of recyclables is sought.

carriers, may enhance the desirability of rail freight from a fuel conservation point of view.[19]

With respect to recyclable commodities, the proposed rate increase will not materially impede their movement and consumption in relationship to their virgin resource counterparts. Since economies other than transportation generally provide the principal constraints on recycling, increased freight rates equate to fairly insignificant reductions in the total amount of recyclables entering the production process. In fact it is probable that the major hindrance to some recycling programs is not the transportation segment but rather the market availability of the particular commodity.

This is not to say that the increase will not in any way adversely affect the environmental quality. There are recognized advantages of utilizing scrap iron and steel in lieu of iron ore, including the current interest in energy and resource conservation. Where the two commodities are essentially substitutable, every decrease in consumption of scrap must lead to corresponding increase in ore of an equivalent iron unit, assuming steel production is constant. In this sense a policy such as scrap rates increases clearly inhibits the maximum use of scrap. But such overly broad statements do not properly assess the action presently before the Commission, i.e., a proposed 2.8 percent rate increase and a proposed 4.0 percent rate increase. To the extent the demand for scrap is essentially inelastic to transportation costs any decrease in scrap consumption in *direct* response to the increase will, as stated, be insignificant.

[19] The Ex Parte No. 303 and Ex Parte 299 increases constitute separate and distinct proceedings; denial of either or both (either in whole or in part) will affect the ultimate environmental impacts presented in this TAS. Since the impacts are believed to be insignificant for a combined increase (i.e. 6.8 percent), denial would reduce the minimal impacts accordingly.

IV. *Public Awareness.*—By order served July 29, 1974, the Commission initially circulated this Environmental Threshold Assessment survey wherein parties to the proceedings and other interested persons were invited to submit written comments. Responses were received by the Institute of Scrap Iron and Steel, Inc., National Association of Recycling Industries, Inc., Northwestern Steel and Iron Company, and the railroads requesting the subject rate increases. These comments were essentially the same as the submissions in response to the draft impact statements for Ex Parte No. 270 (Sub-Nos. 5 and 6) and Ex Parte No. 295 (Sub-No. 1). They mention the assessment's failure to consider cumulative impacts of successive rate increases, comply with the decision in *SCRAP* v. *U.S.*, 6 ERC 1305 (D. D.C., 1974), and take into account alternative revenue sources such as adjustment of averred noncompensatory rates. Inasmuch as the comments have already been addressed in the mentioned final impact statements (which have been incorporated by reference), a repeat of the related analysis herein does not appear to be warranted.

This assessment is predicated in part on the discussions and conclusions in the two final statements. To the extent the analysis in the statements is believed to be complete and adequate under the provisions of the NEPA, it is believed this assessment likewise fulfills the procedural requirements of the Act. In addition the [*sic*] suggested in the comments are considered unnecessary for the reasons presented in the impact statements. Certain minor textual changes have, however, been made to reflect the current status of related proceedings. In addition the analysis of possible impacts on recyclable commodities has been substantially rewritten in order to more fully explain the methodology employed and to reflect current rail transportation costs.

V. *Environmental Determination.*—Based on an examination of the foregoing information it is determined that these proceedings do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969, §§ 42 U.S.C. 4321, *et seq.*

EXHIBIT A

Revenue ton-mile and freight revenues

CLASS I RAILROADS IN THE UNITED STATES

Year	Revenue ton-miles	Freight revenue	Revenue per ton-mile
	1	2	3
	Millions	*Millions*	*Cents*
1951	646,620	$8,634.1	1.336
1952	614,754	8,788.6	1.430
1953	605,813	8,950.5	1.478
1954	549,259	7,797.9	1.420
1955	623,615	8,538.3	1.370
1956	647,077	8,951.4	1.384
1957	618,194	8,928.5	1.445
1958	551,667	8,070.8	1.463
1959	575,529	8,312.2	1.445
1960	572,309	8,025.4	1.403
1961	563,361	7,739.0	1.374
1962	592,862	7,991.1	1.348
1963	621,737	8,146.1	1.310
1964	658,639	8,455.5	1.284
1965	697,878	8,836.0	1.266
1966	738,395	9,280.6	1.257
1967	719,498	9,130.2	1.269
1968	744,023	9,749.8	1.310
1969	767,841	10,346.3	1.347
1970	764,809	10,921.8	1.428
1971	739,743	11,786.1	1.593
1972	776,746	12,570.3	1.618
1973	829,194[a]	13,442.1	1.621

[1] 12 months ended September 30, 1973. [*Reference to note 1 did not appear in the text of the original report.*]

[a] Includes estimated revenue ton-miles for 3d quarter 1973, as reported in Form 298-73 (Revised), August 1973.

Source: Interstate Commerce Commission. TRANSPORT STATISTICS IN THE UNITED STATES (and STATISTICS OF RAILWAYS), annual reports of railroads and RE&1 and OS-B reports.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the —— day of —————— 1975.

EX PARTE NO. 299

INCREASES IN FREIGHT RATES AND CHARGES TO OFFSET RETIREMENT TAX INCREASES—1973

EX PARTE NO. 299 (SUB-NO. 1)

INCREASES IN FREIGHT RATES AND CHARGES TO THE LONG ISLAND RAIL ROAD COMPANY TO OFFSET RETIREMENT TAX INCREASES—1973

The Commission having this day made a report on its investigation of increases in freight rates and charges proposed (1) by common carriers by railroad in the United States, except the Long Island Rail Road Company, in their petition filed August 15, 1973, and subsequent petitions related thereto, and (2) by the Long Island Rail Road Company in its petition filed August 24, 1973, and subsequent petitions related thereto, said report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondent railroads, insofar as they participate in the traffic and have increased their rates or charges as authorized for the railroads, except the Long Island, in the Commission's orders of September 13, 1973 and of February 28, 1974, and as authorized for the Long Island Rail Road Company in an order issued September 27, 1973 by the United States District Court for the Eastern District of New York and in the Commission's order of December 6, 1974, shall cease and desist on or before September 15, 1975, from collecting rates

increased to a greater extent than found just and reasonable herein and to promptly refund to the parties entitled thereto any amounts due under the refund provisions applicable to these increases;

It is further ordered, That the respondent railroads be, and they are hereby, required to cancel the schedules under investigation to the extent not approved herein, on or before September 15, 1975, upon not less than 15 days' notice to the Commission and the general public by filing and posting in the manner prescribed by the Commission under the Interstate Commerce Act, without prejudice to the establishment and maintenance of schedules in conformity with the findings herein;

It is further ordered, That further changes in freight rates and charges, to the extent authorized herein, may be made effective upon not less than 15 days' notice to the Commission and the general public, by filing and posting in the manner prescribed in the act;

It is further ordered, That outstanding orders in other proceedings are hereby modified so as to permit establishment of the further changes in interstate freight rates and charges herein authorized;

It is further ordered, That all tariff schedules changing interstate rates or charges under the authority of this order, which rates or charges are now maintained or held in force by virtue of outstanding orders of the Commission, shall make specific reference to this order;

It is further ordered, That the respondents herein be, and they are hereby, required (1) to incorporate the Long Island's terminal surcharge approved herein into all tariffs naming the joint rates from and to points on the Long Island Rail Road Company within 2 years from the date of service of this report and order, (2) to continue on a priority basis their efforts to bring tariff schedules

up to date, and (3) to report their progress to the Commission's Bureau of Traffic not later than October 1, 1975, and quarterly thereafter until otherwise ordered;

It is further ordered, That the respondents shall continue to take appropriate action to eliminate their service deficiencies and to file quarterly reports (i.e., October 1, 1975, January 1, 1976, et cetera), as originally ordered in Ex Parte No. 265, *Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125, 307, informing the Commission of corrective actions taken;

It is further ordered, That in making effective any increases in rates and charges herein authorized, the respondents be, and they are hereby, required to protect and maintain all existing port relationships and to apply any such increases on export and import traffic subject to the limitations provided in this report;

It is further ordered, That in all other respects, the original petitions, as amended, seeking authority to increase the interstate freight rates and charges be, and they are hereby, denied;

And it is further ordered, That these proceedings be, and they are hereby, discontinued.

FOURTH-SECTION ORDER NO. 20485

It appearing, That carriers parties to the proceeding applied for relief from the provisions of section 4 of the act necessary to establish the rates and charges sought; that the increase in rates and charges authorized herein cannot be published and made effective without producing in some instances rates or charges that yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than the aggregate of intermediate rates or charges subject to the act, in contravention of section 4 thereof;

It is ordered, That carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to depart from the provisions of section 4 of the act to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte Nos. 299 and 299 (Sub-No. 1) of this date;

It is further ordered, That carriers parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges authorized in order of this date, without observing the long- and short-haul provisions of section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by the failure of the State authorities to authorize the full increases permitted in said proceeding;

And it is further ordered, That in those instances in which rates in contravention of section 4 are established under authority contained herein, the schedules containing such rates shall make reference to this order in the manner required by rule 28 of the Tariff Circular No. 20.

SPECIAL PERMISSION NO. 76-200

It is ordered, That the Long Island Rail Road Company be, and it is hereby, authorized to depart from the Commission's tariff publishing regulations to maintain its terminal surcharge tariff, such rule relief to expire 2 years from the service date of this report and order;

It is further ordered, That the publication maintained hereunder shall be amended to provide an expiration date concurrent with the expiration date of the rule relief authorized hereby.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

APPENDIX C

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 23rd day of November, 1976.

EX PARTE NO. 299 (SUB-NO. 1)

INCREASES IN FREIGHT RATES AND CHARGES OF THE LONG ISLAND RAIL ROAD COMPANY TO OFFSET RETIREMENT TAX INCREASES—1973

Upon consideration of the record in the above-entitled proceeding, including the Second Supplemental Report and Order of the Commission, 350 I.C.C. 673, 705 (1975); the petition for reconsideration, including a request for oral argument, of the southern and western railroads, filed October 28, 1975; and the reply of the Long Island Rail Road Company, filed December 1, 1975; and

It appearing, That the petitioners do not show why the issues in this proceeding would be further developed by oral argument;

It further appearing, That the petition for reconsideration does not show adequate grounds for granting the relief sought;

And it further appearing, That compliance with the final order entered in this proceeding can be accomplished with minimum difficulty by the publication in the rate tariffs of an appropriate surcharge item or rule to the effect that the otherwise applicable total line-haul freight charges on shipments originating or terminating on the Long Island Rail Road Company are subject to a 12.5 percent surcharge which accrues solely to the Long Island Rail Road Company. Any such surcharge item or rule shall contain the following notation:

"Issued in conformity with order of the Commission of in Ex Parte No. 299 (Sub-No. 1)"

Wherefore, and good cause appearing therefor:

It is ordered, That the petition for reconsideration, and the request for oral argument, be, and they are hereby, denied.

And it is further ordered, That the above mentioned report and order in this proceeding be, and it is hereby, modified only insofar as (1) it shall become effective 30 days from the date of service of this order, and (2) the railroads are required to incorporate the 12.5 percent terminal surcharge into all tariffs naming the rates from and to points on the Long Island Rail Road Company on or before September 12, 1977, and (3) concurrently with the incorporation of the 12.5 percent surcharge into the rate tariffs, the Long Island Rail Road Company shall cancel its Terminal Surcharge Tariff 69-A, I.C.C. 1112.

By the Commission. (Commissioner Murphy dissented with separate expression; Vice Chairman Clapp, whom Commissioner O'Neal join, dissented with separate expression and Commissioners Corber and Christian did not participate.)

/s/ Robert L. Oswald
ROBERT L. OSWALD
Secretary

[SEAL]

COMMISSIONER MURPHY, dissenting:

I would grant the petition for reconsideration and the request for oral argument.

As noted in my separate expression, *Increases in Freight Rates and Charges—1973*, 350 I.C.C. 673, 719-724, the proposal by the Long Island is, among other

things, a unilateral attempt by one small carrier to change the divisional basis on joint rates without the consent or concurrence of other carrier parties to those joint rates. In suggesting two methods of incorporating the disputed surcharge into the rates, the Long Island proposes: (a) footnoting the incorporation to show that the rates are subject to the Long Island's surcharge, and (b) simply republishing the joint rates with the 12.5 percent surcharge embodied therein. Neither proposal is appropriate. The footnoting method would, in effect, retain the surcharge for an indefinite period, contrary to the reasoning of the majority in *Increases in Freight Rates and Charges —1973, supra*, at 713.

Simple incorporation of the surcharge as proposed in method (b) would, as frankly admitted by the Long Island, result in a change in the divisional share of the joint rates. The inequity of that approach is further heightened by the realization that the refusal of the Long Island to join in the 2.8 percent increase now available to petitioners to and from all points *except* those on the Long Island, deprives petitioners of any revenues to cover their undisputed increased costs to and from points on the Long Island. (Emphasis added) Thus, not only would petitioners be asked to assume an onerous burden of publishing the joint rates with the Long Island's surcharge embodied therein, and without any recompense therefor, but they would also be unable to raise those same joint rates to recoup their lawful costs as directed by Public Law 93-69.

Either method, (a) or (b), for incorporating the Long Island's surcharge into the existing joint rates would be a departure from the standards utilized in general revenue proceedings. In those proceedings, reliance is usually placed on the decision in *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry. Co.*, 284 U.S. 370 for the principle that the increases authorized are not considered prescribed. The

order herein, however, would, in effect, be tantamount to such a prescription in violation of the principle in the cited decision.

Finally, in conformity with my separate expression in the prior report herein, *Increases in Freight Rates and Charges—1973, supra*, at 720, acceptance of either of the Long Island's suggestions is a virtual abdication of this Commission's responsibilities and in violation of the law. In that respect, Cf., *Schechter Corp.* v. *United States*, 295 U.S. 495, 537 (1935).

In summary, petitioners have submitted meritorious grounds for a reversal of the prior decision and I would grant the relief sought. To the extent that the majority fails to honor that request, I respectfully dissent from that decision and stand on my position in *Increases in Freight Rates and Charges—1973, supra*, as further elaborated herein.

VICE CHAIRMAN CLAPP, whom COMMISSIONER O'NEAL join, dissenting:

In the prior report, *Increases in Freight Rates and Charges—1973*, 350 I.C.C. 673, 724-725, I dissented from the majority's resolution of Ex Parte 299 (Sub-No. 1). Consistent therewith, I would grant the petition for reconsideration.

I continue to believe that it is irresponsible and contrary to our statutory responsibilities under the Interstate Commerce Act and the Railroad Retirement Act (P.L. 93-69) to approve this surcharge and to allow it to become a permanent addition to rail tariff schedules. Section 201 (4)(c) of P.L. 93-69 amended the Interstate Commerce Act by providing that in reaching a final rate determination in this matter the Commission "shall determine such final rates under the standards and limitations applicable to ratemaking generally under Part I of this Act." The United States District Court for the Eastern District of

New York in *Long Island R.* v. *United States*, 388 F. Supp. 943 (1974) also acknowledged the Commission's duty when it stated:

> In holding that the LIRR's proposal of a terminal surcharge was an appropriate method of effecting an interim rate increase under section 15a(4)(b), we express no view with respect to its propriety as a final solution to the problem of recovering increased costs. This is properly the Commission's decision to make in the first instance in the hearings mandated by section 15a(4)(c). The latter provision on its face appears to contemplate the consideration of more factors than are appropriate under the interim measures of section 15a(4)(b).

Yet, neither the prior report nor the instant order evidences any serious independent analysis of the propriety of the surcharge as a final solution or alternatives thereto. Furthermore, in my opinion the recent acceptance by the LIRR of numerous general increases not applicable for its account when the surcharge was proposed mandates a finding that the level of the surcharge remains reasonable. No such discussion or finding appears in the instant order.

I am also greatly troubled by the majority's decision to allow the LIRR to recoup all its increased tax liabilities from interstate freight shippers, which tender only approximately 10 percent of LIRR's traffic. Despite our duty to interstate shippers, the majority is here protecting (on no valid statutory basis) intrastate passenger operations to the substantial detriment of freight shippers to and from Long Island. Clearly, this constitutes an undue burden on interstate commerce.

Accordingly, for the reasons expressed in my prior expression and supplemented here, I cannot concur in the majority's decision. Today's result is approval of a plan which is inappropriate and in violation of the Interstate Commerce Act.

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT
E. D. NEW YORK

No. 73-C-1434

LONG ISLAND RAILROAD,
Plaintiff,

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, *et al.,*
Defendants.

Oct. 18, 1974

Before MOORE, Circuit Judge, and NEAHER and BARTELS, District Judges.

MOORE, Circuit Judge:

This is an action brought by the plaintiff Long Island Railroad ("LIRR") to review, set aside and enjoin the enforcement of orders of the Interstate Commerce Commission (the "Commission"), dated September 13, 1973, and September 21, 1973, entitled Ex Parte No. 299 (Sub-No. 1), Increases in Freight Rates and Charges of the Long Island Rail Road Company to Offset Retirement Tax Increases—1973. The jurisdiction of the district court is founded on 28 U.S.C. § 1336, and a three-judge panel was convened in accordance with 28 U.S.C. § 2325.

In the Railroad Retirement Amendments of 1973, P.L. 93-69, 87 Stat. 162, the Congress, *inter alia,* provided for increased taxes on railroads to be contributed toward additional retirement benefits for railroad employees. Title II of P.L. 93-69, the Railroad Rate Adjustment Act of 1973, amended section 15a of the Interstate Commerce Act (49 U.S.C. § 15a) to ensure that each railroad would

be able to offset the increased retirement taxes by means of higher rates. Congress established a three-step procedure by which the rate adjustments would be implemented.[1] Section 15a(4)(a) directed the Commission to establish rules stating the requirements for railroads' petitions for adjustment of interstate rates based on increases in the railroad retirement taxes. Section 15a(4)(b) then directed the Commission to permit interim increases "in the general level of the interstate rates" within thirty days of the filing of a proper petition. Finally, section 15a(4)(c) provided for hearings to commence within 60 additional days for the purpose of making final rate determinations. In the event that the interim rates exceeded the rates finally approved, section 15a(4)(c) authorized the Commission to order refunds of the excess, plus a reasonable rate of interest.

On July 30, 1973, after a rule-making proceeding, the Commission issued rules setting forth procedures to be followed in the filing of petitions for increased rates. Ex Parte No. 298, Requirements and Procedures Relating to Railroad Rate Adjustment Act of 1973, 49 C.F.R. Part 1107. On August 15, 1973, the nation's railroads other than the LIRR filed a joint petition seeking an interim rate increase in their interstate freight rates of 2.0 percent, effective October 1, 1973, and a further increase to 2.7 percent on January 1, 1974. The LIRR filed an individual petition on August 24, 1973, requesting an interim terminal surcharge of 3.5 percent, effective October 1, 1973, to be increased to 5.5 percent on January 1, 1974.

The decision to proceed individually for a terminal surcharge rather than join the petition of the other railroads was prompted by circumstances peculiar to the LIRR. The LIRR estimated that its additional costs in

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[1] Subsection 15a(4)(d), (e) were also added by the Railroad Rate Adjustment Act of 1973 but are not relevant to this case.

1974, resulting from the retirement tax increases would be in excess of \$5,400,000.[2] But it projected freight revenues in the same period to be less than \$10,000,000.[3] Thus, the LIRR felt that it could not join the petition of the other railroads for a rate increase that would be only 2.7 percent in 1974, since this would have yielded additional revenues in the neighborhood of \$270,000, or only about 5 percent of increased retirement tax costs. In contrast, the terminal surchage[4] would generate over \$3,600,000 in 1974,[5] with the remaining differential to be recovered through better productivity and increased traffic.[6]

On September 13, 1973, the Commission issued a report and order permitting the establishment of the interim freight rate increases of the railroads other than the

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[2] Verified Statement of Thomas P. Moore in Support of the Long Island Rail Road's Petition for Increases in Freight Rates and Charges to Offset Increases in Retirement Taxes, at 2 (Sept. 17, 1973).

[3] Brief for the LIRR at 6.

[4] The terminal surcharge provides for imposition of a surcharge, in addition to line-haul rates, to or from points on the LIRR. Revenues from the surcharge accrue solely to the LIRR. In contrast, had the LIRR joined the petition of the other railroads, the increases would have been subject to the usual divisions for freight interlined with other carriers. The LIRR receives only about 14 percent of through freight charges to and from points on the LIRR. The LIRR estimated that to recoup its cost increases from its share of the line-haul rates would have required an increase of 37.5 percent in all line-haul rates involving the LIRR. *See* The Long Island Rail Road Company's Petition for Increases in Freight Rates and Charges to Offset Increases in Retirement Taxes 3 (Sept. 17, 1973).

[5] Verified Statement of James L. Faraci in Support of The Long Island Rail Road's Petition for Increases in Freight Rates and Charges to Offset Increases in Retirement Taxes 2-3 (Sept. 17, 1973).

[6] Petition, *supra* note 4, at 2.

LIRR[7] and rejecting without prejudice the filing of the LIRR's terminal surcharge tariff. On September 18, the LIRR filed a petition for reconsideration, which was denied by the Commission in an order dated September 21, 1973. Three days later the LIRR commenced this action, and on September 27, 1973, Judge Bartels issued a Temporary Restraining Order (TRO) restraining the Commission

> from enforcing or otherwise making effective its orders of September 13, 1973 and September 21, 1973, in Ex Parte 299 (Sub-No. 1) and from refusing to accept for filing the aforementioned proposed tariff of plaintiff to become effective October 8, 1973.

In addition, Judge Bartels ordered that sums collected pursuant to the terminal surcharge be held in a separate trust account, subject to refund at six percent interest, until further order of the court.

Pursuant to the TRO, the LIRR's terminal surcharge was filed with the Commission and became effective October 8, 1973. Ten days thereafter, on October 18, this three-judge court heard arguments by attorneys for all parties, including the intervenors, namely, the Eastern District Railroads, the Western District Railroads, and the Southern Railway. With the exception of the LIRR, the parties urged this court to defer decision until after the Commission's order with respect to a final rate determination. However, the Commission's decision has not been forthcoming.

[7] Ex Parte No. 299, Increases in Freight Rates and Charges to Offset Retirement Tax Increases—1973. The Commission reduced increases proposed by the railroads to 1.9 percent effective October 1, 1973, and 2.6 percent effective January 1, 1974. The Commission noted that the uniform percentage increase created certain inequities, since some railroads received more revenues than necessary to offset retirement tax increases while others received less than required. Ex Parte 299 at 6-7. The Commission's order therefore directed the railroads to submit a plan to correct the inequities at the final rate hearings. *Id.* at 7.

Section 15a(4)(b), pertaining to interim rate increases to offset retirement tax expenses, provides:

> (b) Notwithstanding any other provision of law, the Commission shall, within thirty days of the filing of a verified petition in accordance with rules promulgated under subparagraph (a) of this paragraph, by any carrier or group of carriers subject to this chapter, permit the establishment of increases in the general level of the interstate rates of said carrier or carriers in an amount approximating that needed to offset increases in expenses theretofore experienced or demonstrably certain to occur commencing on or before the effective date of the increased rates, as a result of any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such increases in rates may be made effective on not more than thirty nor less than ten days' notice to the public, notwithstanding any outstanding orders of the Commission. To the extent necessary to effectuate their establishment, rates so increased shall be relieved from the provisions of section 4 of this title and may be published in tariff supplements of the kind ordinarily authorized in general increase proceedings.

The rejection of the Long Island's terminal surcharge was based upon the Commission's conclusion that section 15a(4)(b) does not permit such a tariff.[8] The Commission reasoned as follows:

[8] The Commission also referred to the failure of the LIRR to include a refund provision in its proposed tariff. However, this defect had been cured when the LIRR requested reconsideration on September 18 and is of no significance here.

Notwithstanding the petitioner's position and arguments, paragraph (4)(b) of the amendment to section 15a of the act requires that the Commission shall "permit the establishment of increases in the general level of the interstate rates" of a carrier or carriers to offset increases in costs resulting from increases in retirement taxes. Petitioner's proposal of a terminal surcharge, which is not concurred in by other carriers participating in joint rates with the petitioner, is not a tariff supplement of the kind "ordinarily authorized in general increase proceedings," and therefore is not permitted by the statute empowering us to permit "increases in the general level" of rates to effect increased retirement taxes.

Ex Parte 299 (Sub-No. 1) at 8.

We are of the opinion that the Commission has misconstrued section 15a(4)(b) and that this provision does not prohibit a terminal surcharge of the type filed by the LIRR. In this conclusion we are apparently joined by Commissioner Hardin, who wrote a separate opinion.[9] We therefore set aside the order of the Commission in Ex Parte No. 299 (Sub-No. 1) and enjoin the Commission from rejecting the LIRR's terminal surcharge tariff as an interim rate increase. Accordingly, the trust fund ordered established by Judge Bartels' TRO of September 27, 1973, may be dissolved, although sums collected by the LIRR under the terminal surcharge of course remain subject to refund if the LIRR's final rate increase approved by the Commission under section 15a(4)(c) is less than the interim rate increase.

In reaching this decision we are not unmindful of the proposition that the construction put on a statute by the agency charged with administering it is entitled to deference.

[9] Ex Parte 299 and Ex Parte 299 (Sub-No. 1) at 9-10 (Commissioner Hardin concurring in part).

E. g., Volkswagenwerk v. FMC, 390 U.S. 261, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968). But neither are the courts required to rubberstamp an agency interpretation which they deem inconsistent with the plain statutory language and the policy underlying the statute. *Id.* at 272, 88 S.Ct. 929.

The sole apparent basis for the Commission's refusal to permit the LIRR to file its rate increases was that the proposal was "not a tariff supplement of the kind 'ordinarily authorized in general increase proceedings . . . .' " The Commission appears to have concluded that this was a shortcoming which rendered the terminal surcharge impermissible under the statute. However, section 15a(4)(b) says only that tariff supplements of a kind ordinarily authorized in general increase proceedings "may" be used, not that they must be. In this respect the statute is clearly permissive and not mandatory, and this portion does not prohibit a terminal surcharge.

Nor can we perceive any other basis for concluding that the LIRR's proposal is not authorized by section 15a(4)(b). It is clear that the section contemplates that a carrier might choose to file independently for an interim rate increase rather than petition along with other carriers as a member of a group. Section 15a(4)(b) allows "any *carrier* or group of carriers" to file a petition, and directs the Commission to "permit the establishment of increases in the general level of the interstate rates of said *carrier* or carriers" so as to offset retirement tax increases (emphasis added). Thus, the fact that the LIRR filed individually surely does not render its proposal invalid. And since the terminal surcharge would apply to all interstate freight proceeding to or from points on the LIRR, it has the effect of raising the general level of the LIRR's interstate rates.

The entire thrust of section 15a(4)(b) is toward establishment of an expedited method of getting the necessary

higher rates into effect. Congress sought to remove procedural obstacles and, therefore, began the section with the words: "Notwithstanding any other provision of law." The sole inquiry at the interim stage was to be whether the proposed increase clearly exceeded the amount needed to cover increases in costs. *See* Conference Report No. 93-319, 1 U.S.Code Cong. & Admin. News 1658, 1661 (1973). Under these circumstances, the Commission's denial of the LIRR's terminal surcharge as an interim rate increase was not only unwarranted but also frustrated Congress' evident purpose to assure that railroads were immediately able to recover their increased retirement benefit contributions.

In holding that the LIRR's proposal of a terminal surcharge was an appropriate method of effecting an interim rate increase under section 15a(4)(b), we express no view with respect to its propriety as a final solution to the problem of recovering increased costs. This is properly the Commission's decision to make in the first instance in the hearings mandated by section 15a(4)(c). The latter provision on its face appears to contemplate the consideration of more factors than are appropriate under the interim measures of section 15a(4)(b).

So ordered.

APPENDIX E

APPENDIX E

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. A-688

Long Island Railroad Company,
Petitioner,
v.
Aberdeen & Rockfish Railroad Company et al.

ORDER

The application for a stay of the judgment of the United States Court of Appeals for the Fifth Circuit in case No. 77-1054 presented to Mr. Justice Powell and by him referred to the Court is granted, only insofar as the judgment requires applicant Long Island Railroad Company to keep in a separate trust fund the proceeds of the interim 12.5 per cent terminal surcharge, pending the timely filing of a petition for writ of certiorari. Should a timely petition for writ of certiorari not be filed or be denied, this stay is to terminate automatically. If the petition for writ of certiorari is granted, this stay is to remain in effect pending the judgment of this Court.

In all other respects, the application for stay is denied.

Mr. Justice Powell took no part in the consideration or decision of this application.

/s/ W. E. B.
Chief Justice of the United States

March 6, 1978

APPENDIX F

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1054

ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners,

versus

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
Respondents.

U.S. Court of Appeals, Filed January 25, 1978
Edward W. Wadsworth, Clerk.

Petition for Review of an Order of the Interstate Commerce Commission

(TEXAS CASE)

ON PETITION FOR REHEARING

(January 25, 1978)

Before GOLDBERG and HILL, Circuit Judges, and WYZANSKI,* Senior District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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* Senior District Judge for the District of Massachusetts, sitting by designation.

ENTERED FOR THE COURT:

/s/ Charles E. Wyzanski
CHARLES E. WYZANSKI
United States District Judge

APPENDIX G

APPENDIX G

A. Railroad Retirement Amendments of 1973, Pub. L. 93-69, 87 Stat. 162:

AN ACT

To amend the Railroad Retirement Act of 1937 and the Railroad Retirement Tax Act to revise certain eligibility conditions for annuities; to change the railroad retirement tax rates; and to amend the Interstate Commerce Act in order to improve the procedures pertaining to certain rate adjustments for carriers subject to part I of the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—RAILROAD RETIREMENT ACT AMENDMENTS

SEC. 101. Section 2(a) of the Railroad Retirement Act of 1937 is amended—

(1) by striking out "Women" in paragraph 2 and inserting in lieu thereof "Individuals";

(2) by striking out "Men who will have attained the age of sixty and will have completed thirty years of service, or individuals" in paragraph 3 and inserting in lieu thereof "Individuals"; and

(3) by striking out "such men or" in paragraph 3 thereof.

SEC. 102. (a) Section 3201 of the Internal Revenue Code of 1954 (relating to the rate of tax on employees under the Railroad Retirement Tax Act) is amended by striking out all that appears therein and inserting in lieu thereof the following:

"In addition to other taxes, there is hereby imposed on the income of every employee a tax equal to the rate of the tax imposed with respect to wages by section 3101(a) of the Internal Revenue Code of 1954 plus the rate imposed by section 3101(b) of such Code of so much of the compensation paid to such employee for services rendered by him after September 30, 1973, as is not in excess of an amount equal to one-twelfth of the current maximum annual taxable 'wages' as defined in section 3121 of the Internal Revenue Code of 1954 for any month after September 30, 1973."

(b) Section 3202(a) of such Code is amended—

(1) by striking out "1965" wherever it appears in the second sentence thereof and inserting in lieu thereof "1973";

(2) by striking out "(i) $450, or (ii)" wherever it appears in the second sentence thereof; and

(3) by striking out ", whichever is greater," wherever it appears in the second sentence thereof.

(c) Section 3211(a) of such Code (relating to the rate of tax on employee representatives under the Railroad Retirement Tax Act) is amended by striking out all that appears therein and inserting in lieu thereof the following:

"(a) In addition to other taxes, there is hereby imposed on the income of each employee representative a tax equal to 9.5 percent plus the sum of the rates of tax imposed with respect to wages by sections 3101(a), 3101(b), 3111(a), 3111(b) of the Internal Revenue Code of 1954 of so much of the compensation paid to such employee representative for services rendered by him after September 30, 1973, as is not in excess of an amount equal to one-twelfth of the current maximum annual taxable 'wages' as defined in section 3121 of the Internal Revenue Code of 1954 for any month after September 30, 1973."

(d) Section 3221(a) of such Code (relating to the rate of tax on employers under the Railroad Retirement Tax Act) is amended by striking out "In addition to other taxes" and all that follows to "except that" and inserting in lieu thereof the following:

"In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to 9.5 percent of so much of the compensation paid by such employer for services rendered to him after September 30, 1973, as is, with respect to any employee for any calendar month, not in excess of an amount equal to one-twelfth of the current maximum annual taxable 'wages' as defined in section 3121 of the Internal Revenue Code of 1954 for any month after September 30, 1973;".

(e) Section 3221(a) of such Code, as amended by section 102(d) of this Act, is further amended—

(1) by striking out "1965" wherever it appears in the first sentence thereof and inserting in lieu thereof "1973";

(2) by striking out "(i) $450, or (ii)" wherever it appears in the first sentence thereof; and

(3) by striking out "whichever is greater," wherever it appears in the first sentence thereof.

(f) Section 3221(b) of such Code is amended by striking out all that appears therein and inserting in lieu thereof the following:

"(b) The rate of tax imposed by subsection (a) shall be increased, with respect to compensation paid for services rendered after September 30, 1973, by the rate of tax imposed with respect to wages by section 3111(a) of the Internal Revenue Code of 1954 plus the rate imposed by section 3111(b) of such Code."

SEC. 103. (a) Section 6 of Public Law 91-377, as amended by section 8(c) of Public Law 92-46, is further amended by striking out "June 30, 1973" each time that date appears and inserting in lieu thereof "December 31, 1974".

(b) Section 8(b) of Public Law 92-46 is amended by striking out "June 30, 1973" each time that date appears and inserting in lieu thereof "December 31, 1974".

(c) Section 5(b) of Public Law 92-460 is amended by striking out "June 30, 1973" each time that date appears and inserting in lieu thereof "December 31, 1974".

SEC. 104. (a) Section 3(a) of the Railroad Retirement Act of 1937 is amended by inserting at the end thereof the following new paragraph:

"(6) If title II of the Social Security Act is amended to provide an increase in benefits payable thereunder at any time during the period July 1, 1973, through December 31, 1974, the individual's annuity computed under the preceding provisions of this subsection and that part of subsection (e) of this section which precedes the first proviso shall be increased in an amount equal to the difference between (i) the amount (before any reduction on account of age) which would be payable to such individual under the then current law if his or her annuity were computed under the first proviso of section 3(e) of this Act, without regard to the words 'plus 10 per centum of such amount' contained therein; and (ii) the amount (before any reduction on account of age) which would have been payable to such individual under the law as in effect prior to July 1, 1973, if his or her annuity had been computed under such first proviso of section 3(e) of this Act, without regard to the words 'plus 10 per centum of such total amount' contained therein (assuming for this purpose that the eligibility conditions and the proportions of a primary insurance amounts payable under the

then current Social Security Act had been in effect prior to July 1, 1973): *Provided, however,* That, in computing such amount, only the social security benefits which would have been payable to the individual whose annuity is being compupted under this Act shall be taken into account: *Provided further,* That if an annuity accrues to an individual for a part of a month the added amount payable for such part of a month under this section shall be one-thirtieth of the added amount payable under this section for an entire month, multiplied by the number of days in such part of a month. If wages or compensation prior to 1951 are used in making any computation required by this paragraph, the Railroad Retirement Board shall have the authority to approximate the primary insurance amount to be utilized in making such computation. In making any computation required by this paragraph, any benefit to which an individual may be entitled under title II of the Social Security Act shall be disregarded. For purposes of this paragraph, individuals entitled to an annuity under section 2(a)(2) of this Act shall be deemed to be age 65, and individuals entitled to an annuity under section 2(a)(3) of this Act who have not attained age 62 shall be deemed to be age 62. Individuals entitled to annuities under section 2(a)(4) or 2(a)(5) of this Act for whom no disability freeze has been granted shall be treated in the same manner for purposes of this paragraph as individuals entitled to annuities under section 2(a)(4) or 2(a)(5) for whom a disability freeze has been granted. In the case of an individual who is entitled to an annuity under this Act but whose annuity is based on insufficient quarters of coverage to have a benefit computed, either actually or potentially, under the first proviso of section 3(e) of this Act, the average monthly wage to be used in determining the amount to be added to the annuity of such individual shall be equal to the average monthly compensation or the average monthly earnings, whichever is applicable, used to

enter the table in section 3(a)(2) of such Act for purposes of computing other portions of such individual's annuity."

(b) Section 2(e) of the Railroad Retirement Act of 1937 is amended—

(1) by striking out "section 3(a), (3), (4), or (5) of this Act" and inserting in lieu thereof "section 3(a), (3), (4), (5), or (6) of this Act";

(2) by striking out the second sentence of the last paragraph; and

(3) by adding at the end thereof the following new paragraph:

"The spouse's annuity computed under the other provisions of this section shall (before any reduction on account of age) be increased in an amount determined by the method of computing increases set forth in subsection (a)(6) of section 3. The preceding sentence and the other provisions of this subsection shall not operate to increase the annuity of a spouse (before any reduction on account of age) to an amount in excess of the maximum amount of a spouse's annuity as provided in the first sentence of this subsection. This paragraph shall be disregarded in the application of the preceding three paragraphs."

(c) Section 2(i) of the Railroad Retirement Act of 1937 is amended by striking out "the last paragraph plus the two proceeding paragraphs" and inserting in lieu thereof "the last paragraph plus the three preceding paragraphs".

(d) Section 5 of the Railroad Retirement Act of 1937 is amended by inserting at the end thereof the following new subsection:

"(q) A survivor's annuity computed under the preceding provisions of this section shall be increased in an

amount determined by the method of computing increases set forth in subsection (a)(6) of section 3: *Provided, however,* That in computing such an amount for an individual entitled to an annuity under subsection 5(a)(2), the 90.75 per centum figure appearing in the third paragraph of section 3(e) of this Act shall be deemed to be 82.5 per centum."

SEC. 105. If title II of the Social Security Act is amended to provide an increase in benefits payable thereunder at any time during the period July 1, 1973, through December 31, 1974, the pension of each individual under section 6 of the Railroad Retirement Act of 1937 and the annuity of each individual under the Railroad Retirement Act of 1935 shall be increased in an amount determined by the method of computing increases set forth in subsection (a) of section 104 of this Act, deeming for this purpose the average monthly earnings (in the case of a pension) or the average monthly compensation (in the case of an annuity under the Railroad Retirement Act of 1935) which would be used to compute the basic amount if the individual were to die to be the average monthly wage.

SEC. 106. All recertifications required by reason of the amendments made by sections 104 and 105 of this Act shall be made by the Railroad Retirement Board without application therefor.

SEC. 107. (a) For the purpose of preparing and submitting the report provided for in subsection (c), it shall be the duty and responsibility of representatives of employees to designate (within the thirty-day period commencing on the date of enactment of this Act) and notify the Senate Committee on Labor and Public Welfare and the House Committee on Interstate and Foreign Commerce of the identity (by name and position) of the labor members, and of representatives of carriers to designate

(within such thirty-day period) and notify such committees of the identity (by name and position) of the management members, who shall compose the group authorized to prepare in their behalf, the report provided for in subsection (c).

(b) The group so authorized to prepare the report provided for in subsection (c) shall—

(1) hold such meetings (which shall not be less often than once each month) as may be necessary to assure that such report will be submitted within the time provided, and contain the material prescribed, under subsection (c); and

(2) submit to such committees on September 1, 1973, November 1, 1973, and January 1, 1974, interim reports as to the progress being made toward completion of the report provided for in subsection (c); except that no such interim report shall be submitted after the submission of the report provided for in subsection (c).

(c)(1) Not later than April 1, 1974, representatives of employees and representatives of carriers, acting through the group designated by them pursuant to subsection (a), shall submit to such committees a report containing their joint recommendations for restructuring the railroad retirement system in a manner which will assure the long-term actuarial soundness of such system, which recommendations shall take into account the specific recommendations of the Commission on Railroad Retirement.

(2) The joint recommendations contained in such report shall be specific and shall be presented in the form of a draft bill.

SEC. 108. The Congress hereby declares its intent to enact legislation in 1974, effective not later than January 1, 1975, which will assure the long-term actuarial soundness of the railroad retirement system.

SEC. 109. (a) The amendments made by section 101 of this Act shall become effective on July 1, 1974: *Provided, however,* That those amendments shall not apply to individuals whose annuities began to accrue prior to that date.

(b) The amendments made by section 102 of this Act shall become effective on October 1, 1973, and shall apply only with respect to compensation paid for services rendered on or after that date: *Provided, however,* That such amendments shall not be applicable to any dock company, common carrier railroad, or railway labor organization described in section 1(a) of the Railroad Retirement Act of 1937, with respect to those of its employees covered as of October 1, 1973, by a private supplemental pension plan established through collective bargaining, where a moratorium in an agreement made on or before March 8, 1973, is applicable to changes in rates of pay contained in the current collective-bargaining agreement covering such employees, until the earlier of (1) the date as of which such moratorium expires, or (2) the date as of which such dock company, common carrier railroad, or railway labor organization agrees through collective bargaining to make the provisions of such amendments applicable.

(c) The amendments made by sections 103 and 104 of this Act shall be effective on the enactment date of this Act: *Provided, however,* That any increases in annuities or pensions resulting from the provisions of sections 104 and 105 of this Act shall be effective on the same date or dates as the benefit increases under title II of the Social Security Act which gave rise to such annuity or pension increases are effective.

SEC. 110. This title may be cited as the "Railroad Retirement Amendments of 1973".

TITLE II—INTERSTATE COMMERCE ACT AMENDMENTS

SEC. 201. Section 15a of the Interstate Commerce Act (49 U.S.C. 15a) is amended by adding at the end thereof the following new paragraph:

"(4)(a) The Commission shall by rule, on or before August 1, 1973, establish requirements for petitions for adjustment of interstate rates of common carriers subject to this part based upon increases in expenses of such carriers resulting from any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such requirements, established pursuant to section 553 of title 5 of the United States Code (with time for comment limited so as to meet the required date for establishment and subject to future amendment or revocation), shall be designed to facilitate fair and expeditious action on any such petition as required in subparagraph (b) of this paragraph by disclosing such information as the amount needed in rate increases to offset such increases in expenses and the availability of means other than a rate increase by which the carrier might absorb or offset such increases in expenses.

"(b) Notwithstanding any other provision of law, the Commission shall, within thirty days of the filing of a verified petition in accordance with rules promulgated under subparagraph (a) of this paragraph, by any carrier or group of carriers subject to this part, permit the establishment of increases in the general level of the interstate rates of said carrier or carriers in an amount approximating that needed to offset increases in expenses theretofore experienced or demonstrably certain to occur commencing on or before the effective date of the increased rates, as a result of any increases in taxes under

the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such increases in rates may be made effective on not more than thirty nor less than ten days' notice to the public, notwithstanding any outstanding orders of the Commission. To the extent necessary to effectuate their establishment, rates so increased shall be relieved from the provisions of section 4 of this part and may be published in tariff supplements of the kind ordinarily authorized in general increase proceedings.

"(c) The Commission shall within sixty days from the date of establishment of interim rates under paragraph (4)(b) of this section commence hearings for the purpose of making the final rate determination. The Commission shall then proceed to make such final rate determination with the carrier having the burden of proof. In making such determination, the Commission may take into account all factors appropriate to ratemaking generally under part I of this Act and shall determine such final rates under the standards and limitations applicable to ratemaking generally under part I of this Act. If the increases in rates finally authorized by the Commission are less than the increases in rates initially made effective, the carrier or carriers shall, subject to such tariff provisions as the Commission shall deem sufficient, make such refunds (in the amount by which the initially increased rate collected exceeds the finally authorized increased rate) as may be ordered by the Commission, plus a reasonable rate of interest as determined by the Commission. Nothing contained in this paragraph shall limit or otherwise affect the authority of the Commission to authorize or to permit to become effective any increase in rates other than the increases herein specified.

"(d)(A) The State authority having jurisdiction over petitions for intrastate rate increases by any carrier or

group of carriers subject to part I of this Act shall, within 60 days of the filing of a verified petition for such increases based upon increases in expenses of such carriers as a result of any increases in taxes under the Railroad Retirement Tax Act, as amended, occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973, act upon said petition. Such State authority may grant an interim rate increase or a final rate increase. If such State authority grants any interim rate increases, it shall thereafter investigate and determine the reasonableness of such increases and modify them to the extent required by applicable law. To the extent that any such interim increases are reduced as a result of the action of a State authority, the carrier or carriers shall make such refunds (in the amount by which the initially increased rate collected exceeds the finally authorized increased rate) as may be ordered by such State authority, plus a reasonable rate of interest as determined by the State authority.

"(B) If a State authority denies in toto such a petition filed with it by such carrier or group of carriers seeking relief regarding such intrastate rate increases or does not act finally on such petition within 60 days from the presentation thereof, the Commission shall, within 30 days of the filing of a verified petition by such carrier or group of carriers relating to such intrastate rates, act upon such petition by applying the ratemaking criteria of subparagraph (4)(c) of this paragraph. If the Commission grants, in whole or in part, such petition by any carrier or group of carriers, the increase authorized shall be considered as an interim rate increase as provided in subparagraph (A) above and shall be subject to final determination by the State authority in accordance with the procedures prescribed for interim intrastate rate increases as provided above, including the ordering of refunds by such State authority.

"(C) If a State authority denies in part such a petition filed with it by such carrier or group of carriers, within 60 days from the presentation thereof, the Commission shall, within 30 days of the filing of a verified petition by such carrier or group of carriers relating to the intrastate rates involved, act upon such petition by applying the criteria of section 13(4) of this part.

"(D) Nothing in subparagraph (A) or (B) shall be construed to abrogate the authority of the Commission under section 13(4) of this part and in the event a carrier or group of carriers subject to a refund requirement under subparagraph (A) or (B) files a petition under section 13(3), the refund requirement shall be stayed pending final order of the Commission under section 13(4) of this part.

"(e) Any increased freight rates authorized shall not exceed a reasonable level by types of traffic, commodities, or commodity groups and shall preserve existing market patterns and relationships and present port relationships by increase limitations within and between the major districts to the extent possible without authorizing unreasonable increases in any district."

SEC. 202. This title may be cited as the "Railroad Rate Adjustment Act of 1973".

TITLE III—SEPARABILITY

SEC. 301. If any provision of this Act or the application thereof to any person or circumstances should be held invalid, the remainder of such Act or the application of such provision to other persons or circumstances shall not be affected thereby.

Approved July 10, 1973.

B. Statute Governing Divisions of Joint Rates, 49 U.S.C.A. § 15(6) (Supp. 1977):

6(a) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(b) Notwithstanding any other provision of law, the Commission shall, within 180 days after February 5, 1976, establish, by rule, standards and procedures for the conduct of proceedings for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise) in accordance with the provisions of this paragraph. The Commission shall issue a final order in all such proceedings within 270 days after the submission to the Commission of a case. If the Commission is unable to issue such a final order within such time, it shall issue a report to the Congress setting forth the reasons for such inability.

(c) All evidentiary proceedings conducted pursuant to this paragraph shall be completed, in a case brought upon a complaint, within 1 year following the filing of the complaint, or, in a case brought upon the Commission's initiative, within 2 years following the commencement of such proceeding, unless the Commission finds that such a proceeding must be extended to permit a fair and expeditious completion of the proceeding. If the Commission is unable to meet any such time requirement, it shall issue a report to the Congress setting forth the reasons for such inability.

(d) Whenever a proceeding for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise established) is commenced by the filing of a complaint with the Commission, the complaining carrier or carriers shall (i) attach thereto all of the evidence in support of their position, and (ii) during the course of such proceeding, file only rebuttal or reply evidence unless otherwise directed by order of the Commission. Upon receipt of a notice of intent to file a complaint pursuant to this paragraph, the Commission shall accord, to the party filing such notice, the same right to discovery that would be accorded to a party filing a complaint pursuant to this paragraph.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1515

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*, CHESSIE SYSTEM LINES, SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, SOUTHERN GOVERNORS' CONFERENCE, THE UNITED STATES OF AMERICA, and THE INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*

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May 24, 1978

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QUESTIONS PRESENTED

1. Whether the Court of Appeals below erred in holding that the Interstate Commerce Commission failed to give a "reasoned explanation" (App. A, 12a)[1] of its order approving

[1] References herein to the decision of the Court of Appeals, reported at 565 F.2d 327 (5th Cir. 1977), and the decision of the Commission, reported at 350 I.C.C. 673 (1975), are to the Appendices accompanying the Petition for Writ of Certiorari.

a "terminal surcharge" of 12.5 percent for The Long Island Rail Road Company ("Long Island") as a final rate increase to offset increased retirement tax costs under Section 15a(4)(e) of the Interstate Commerce Act (49 U.S.C. §15(4)(e)) (App. G, 11g)[2] in light of the statutory requirement of consistency with the "standards and limitations applicable to ratemaking generally"?

2. Whether the Court of Appeals erred in holding, as a separate ground for setting aside the Commission's order, that the Commission's order changed the applicable divisions of joint rates without the findings required by Section 15(6) of the Interstate Commerce Act (49 U.S.C. §15(6)) (App. G, 14g) to support such a change (App. A, 15a)?

3. Whether the Court of Appeals erred in imposing a trust fund on surcharge revenues which Long Island has been permitted to collect pending remand to the Commission as an equitable alternative to simply setting aside the terminal surcharge found by the Court to have been unlawfully approved?

STATEMENT

The Long Island's arguments, even if they had merit, would not warrant grant of certiorari under the standards established by this Court (Rule 19) because there is no conflict among the circuits and no issue of general importance presented by the unique and non-recurring facts of this case. The lack of importance of the issue is manifest from the Commission's own election not to petition for certiorari. (The United States, also a statutory respondent below, declined to defend the Commission's order in the Court of Appeals and has not petitioned for certiorari in this Court.)

[2]Section 15a(4) was redesignated as Section 15a(6) by Pub.L.94-210, Title II, §205, 90 Stat. 41. All references herein, however, in order to be consistent with the usage of the Commission and the Court of Appeals, shall be to Section 15a(4).

Moreover, the Long Island's arguments are without merit, as can best be demonstrated by setting forth in adequate detail the unique facts of the Long Island's situation as they bear upon the non-recurring issues of interpretation of the Railroad Retirement Amendments of 1973 and the findings required under those Amendments.

Background Facts

Long Island is a commuter railroad whose principal business is transporting commuters between New York City and their residences on Long Island. It is owned and operated as a subsidiary of the New York Metropolitan Transportation Authority ("MTA"), an agency of the State of New York. It also has a small amount of freight business, which accounts for less than 10 percent of its revenues (App. B, 51b).

The traffic involved in this case is freight traffic which moves over Long Island and also over one or more of Railroad Respondents. The railroads which participate in such a haul collect a rate from the shipper for that joint service; each railroad then receives a share, or "division," of that rate. These divisions may be agreed upon, or prescribed by the Commission under Section 15(6) of the Act (49 U.S.C. §15(6)) (App. G, 14g).

The divisions which apply to rates on traffic in which Long Island and Railroad Respondents participate are a combination of agreed and prescribed divisions. To illustrate, consider a shipment of freight moving from the South via Southern railroads 800 miles from the origin to Cincinnati, Ohio—thence via Northern railroads 780 miles to an interchange with Long Island—thence 20 miles to destination on Long Island. The revenue is first divided according to "primary divisions," which determine the share (or "primary

division") of all the railroads performing service in the South, and the share of all the railroads performing service in the North. The primary divisions which apply today are "equal factor" divisions prescribed by the Commission.[3] Applying this equal factor divisional basis, each group of railroads would receive the same compensation for the same amount of service. Thus, in the above example, the Southern railroads would receive a "primary division" of 50 percent of the rate paid by the shipper for their 800 miles of service, and the Northern railroads would likewise receive 50 percent for their 800 miles of service. The Southern railroads would then subdivide their primary division (i.e. their 50 percent) among themselves, and the Northern railroads (including Long Island) would do the same.

Long Island's subdivision of the primary division received by the Northern railroads has been prescribed by the Commission. *Long Island R.R. Co. v. Ahnapee and Western Ry. Co.*, Docket No. 35153 (Order of Division 2, dated April 13, 1973). Long Island's subdivision varies depending upon the origin and destination of the traffic, but its average share of the total rate is 16 percent (App. A, 9a). Thus, if the total freight charge were $1,000 on a shipment moving 800 miles in the South and 800 miles in the North (including 20 miles

[3]The Commission prescribed these equal factor divisions on North-South traffic in *Official-Southern Divisions*, 287 I.C.C. 497 (1953). Efforts by the Northern railroads to obtain disproportionately higher primary divisions have been unsuccessful. *Aberdeen & Rockfish R. Co. v. United States*, 270 F.Supp. 695 (E.D.La. 1967), *aff'd, Baltimore & O. R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968).

Freight traffic between the North and the Southwest is subject to equal-factor divisions identical to the North-South divisions. *Official-Southwestern Divisions*, 287 I.C.C. 553 (1953). The divisions on freight traffic between the North and other areas of the West are determined by agreements between the Northern and Western railroads.

via Long Island), then the Southern and Northern railroads would each receive $500 as their primary division; and Long Island would receive $160 out of the Northern primary division (16 percent of the total rate) as its compensation for its 20 miles (2 percent of 1000 miles) of the total service.

Long Island's Terminal Surcharge

Following the enactment of the Railroad Retirement Amendments of 1973, the railroads undertook to increase their rates to offset their increased retirement taxes. The railroads generally (but not Long Island) sought and received permission to implement a general rate increase of 2 percent (effective October 1, 1973) and an additional increase of 2.7 percent (effective January 1, 1974). Long Island declined to join in the general increase, which did not, therefore, apply to traffic to or from Long Island.[4] Instead, Long Island filed a tariff providing for a "terminal surcharge" to be applied to freight traffic and to accrue solely to Long Island. The "terminal surcharge" originally sought by Long Island was 3.5 percent of the freight charges otherwise applicable, and was later increased to 12.5 percent (App. B, 44b–46b).

Because approximately 90 percent of Long Island's service is commuter service and only 10 percent is freight service, most of Long Island's employees have nothing to do with providing freight service. But instead of raising commuter fares or attempting to obtain increased assistance

[4]Beginning in 1969, Long Island declined to participate with the rest of the railroad industry in general rate increases. In the absence of its consent, the joint rates could not be increased to or from Long Island, and all carriers were deprived of the increased revenues on traffic to or from points on Long Island. The Commission found that Long Island's "motivation is clearly to put pressure on the connecting carriers to renegotiate their present divisions agreements." *Declaratory Order—Rule 52 of Traffic Circular No. 20*, 337 I.C.C. 274, 286 (1970).

from its owner, the State of New York, Long Island sought through its 12.5 percent surcharge to recover from freight rates its entire increased retirement taxes—*including* the 90 percent attributable to commuter employees.

Long Island's refusal to concur in the general rate increase sought by other railroads, together with its filing of a tariff providing for a 12.5 percent terminal surcharge to be retained entirely by Long Island, had the following consequences:

(1) It prevented the other carriers from recovering *any part* of their increased retirement tax costs on traffic to or from Long Island.

(2) Although the total rate (including the 12.5 percent terminal surcharge) paid by freight shippers in movements to and from points on Long Island was the same as the rate paid to adjacent points in New York in which Long Island was not involved,[5] Long Island's share of that total rate was

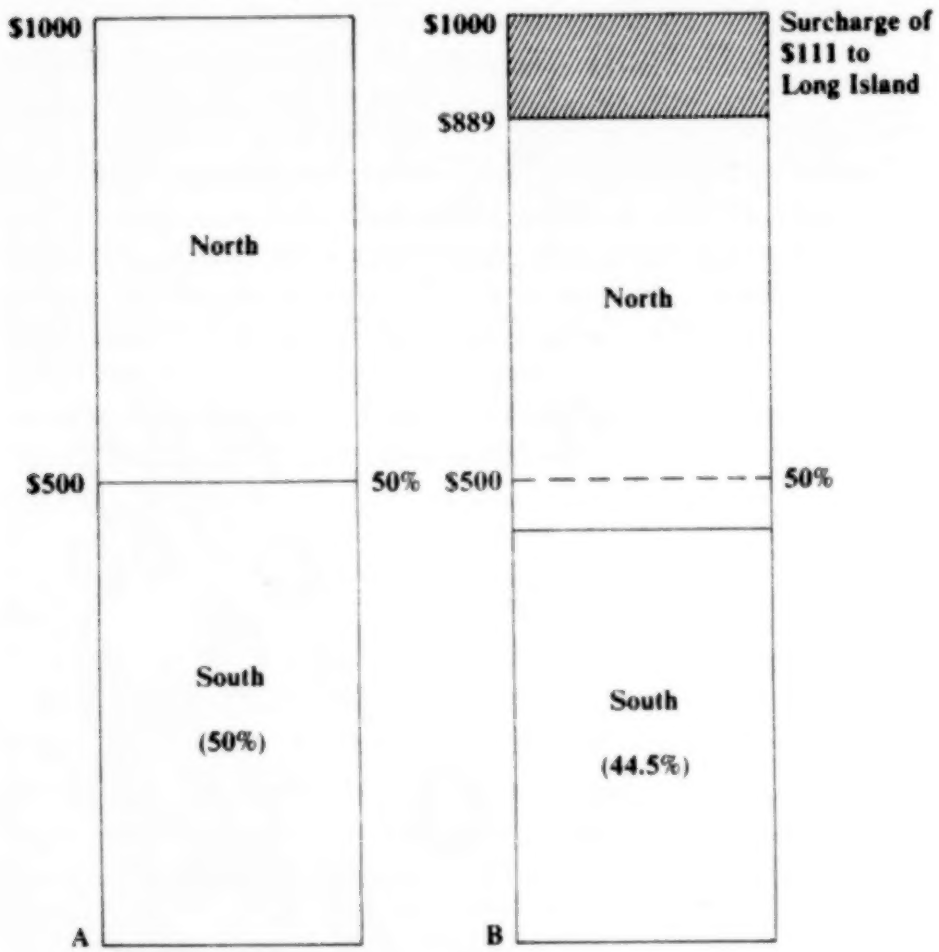
[5]As a result of Long Island's refusal to participate in general rate increases in 1969 and thereafter, rates to and from points on Long Island were lower than those to and from adjacent points in New York. Following the Commission's decision granting Long Island permission to collect the 12.5 percent terminal surcharge, Long Island consented to application of the previously-authorized general revenue increases to freight traffic in which it participates (except for the Ex Parte No. 299 increase of 2.8 percent, and the Ex Parte No. 305 increase of 10 percent) which taken together with the application of the 12.5 percent terminal surcharge, approximately equalized the level of freight charges on an interstate shipment to or from a station on Long Island and the level of freight charges to or from adjacent points in New York not served by Long Island.

The Commission has *not* permitted the total freight charges on traffic to Long Island to exceed the level of total charges to adjacent points in New York. *Sunkist Growers, Inc.* v. *Akron, Canton & Youngstown R. Co.*, Docket No. 35960 (Order dated July 29, 1976), *appeal pending, Atchison, T. & S. F. Ry. Co.* v. *ICC* (5th Cir. No. 77-1946).

dramatically increased. Prior to imposition of the surcharge, Long Island received an average of 16 percent of the revenue for its share of the service (*supra*, p. 4). After the surcharge was imposed, however, Long Island's share of the revenue was increased substantially and the revenue shares of other railroads were correspondingly reduced, although there was no change in the services performed. For example, if the total rate for a 1,600 mile movement were $1,000 (of which $111 consisted of the terminal surcharge on top of the underlying rate of $889), Long Island would receive $253—or 25 percent of the total revenue—for its 2 percent of the haul. Long Island would receive the $111 terminal surcharge and, in addition, 16 percent of what was left (.16 x $889 = $142), for a total of $253 (i.e. 25 percent).

Prior to the imposition of Long Island's terminal surcharge, the Southern railroads received 50 percent of the revenue for their 50 percent of the service. After the surcharge was imposed, however, they received only 44.5 percent of the revenue ([$1,000 − 111] x .50 = $445), although the service of the Southern railroads remained the same. The revenue shares of other lines participating in movements with Long Island, such as the Western railroads, were likewise reduced.

This result may be demonstrated graphically as follows:



Where the freight charge is \$1000 and there is no terminal surcharge, the Southern railroads receive their prescribed division of 50 percent, or \$500 (Graph A). Where part of the revenue is labelled a "terminal surcharge" and given entirely to Long Island (i.e. \$111—or .125 x \$889), then the remainder (i.e. \$889) is divided among the other participating railroads, and the Southern railroads receive \$444, which is only 44.5% of the total freight charge (Graph B).

(3) The impact of Long Island's commuter costs imposed on freight operations by means of the terminal surcharge was greatest as to shipments originating at points

located farthest from Long Island. Because Long Island's terminal surcharge is taken as a percentage of the entire joint rate, the amount received by Long Island increases as to the longer hauls even though Long Island's service remains the same, and even though its proportion of service to the total service is much less.[6]

Proceedings Before the Commission

Subparagraph (4)(b) of the 1973 Railroad Retirement Tax Amendments to Section 15a of the Interstate Commerce Act directed the Commission to permit "interim" increases within thirty days of the filing of a petition seeking an increase. In order to prevent any Commission suspension or other regulatory delay, the Commission was directed to allow the railroads to implement interim increases under paragraph (4)(b) "[n]otwithstanding any other provision of law."

Subparagraph (4)(c) of amended Section 15a directed the Commission to hold hearings and make a final determination as to the proposed increases. In contrast with the provisions of subparagraph 4(b) authorizing interim increases "[n]otwithstanding any other provision of law," subparagraph 4(c) provided that in making its final determination as to proposed rates, the Commission "shall determine such final rates under the standards and limitations applicable to ratemaking generally."

Acting under Subparagraph (4)(b), the Commission held that Long Island's proposed "terminal surcharge" was not

[6]Thus, on a 3,000 mile freight shipment to or from Long Island where the total rate is \$3,000 (joint rate of \$2,667 and terminal surcharge of \$333), Long Island would receive its terminal surcharge of 12.5 percent (\$333) and also its regular division of the remaining revenue of \$2,667. Long Island's surcharge in this instance would be 3 times as large as the surcharge received when the total rate was only \$1000—even though Long Island has performed the very same work, and a smaller percentage of the total work.

the kind of rate increase authorized under Section 15a(4) (see App. B, 45b). In *Long Island R.R. Co.* v. *United States*, 388 F.Supp. 943 (E.D.N.Y. 1974) (App. D)), a three-judge court held that under Section 15a(4)(b) governing *interim* increases, the Commission had no power to prevent a terminal surcharge from becoming effective pending a hearing and final determination (388 F. Supp. at 947) (App. D, 8d). But the court declined to express any view as to the propriety of the terminal surcharge under the very different provisions of subparagraph (4)(c), which requires that any rate increases comply with "the standards and limitations applicable to ratemaking generally," stating (*id.*):

> "[W]e express no view with respect to its propriety as a final solution to the problem of recovering increased costs. ... [Section 15a(4)(c)] on its face appears to contemplate the consideration of more factors than are appropriate under the interim measures of Section 15a(4)(b).

Long Island was thus permitted to file its tariff setting forth a "terminal surcharge" on an interim basis.

The Commission held hearings as required by Section 15a(4)(c) and, following its consideration of the submissions of all parties, made its "final rate determination" in which it approved Long Island's terminal surcharge. The Commission did not make findings justifying the terminal surcharge under the "standards and limitations applicable to ratemaking generally," as required by Section 15a(4)(c). The Commission acknowledged that the terminal surcharge could not be justified by reason of any special service accorded the freight shipper, because it was undisputed that Long Island provided no special terminal service (App. B, 55b). Nor could the terminal surcharge applied to freight rates be justified by costs incurred in handling freight traffic, because 90 percent

of Long Island's increased retirement tax costs were attributable to commuter rather than freight service.[7] Whether any part of these commuter costs could or should be borne by commuters was a question not considered by the Commission but, rather, was regarded as a question for the "managerial discretion" of the MTA, the agency of the State of New York which operates Long Island (App. B, 56b). The Commission treated its responsibility solely as that of "determining the amount of revenue needed" to offset Long Island's retirement tax costs (App. B, 57b). The Commission did not even discuss, much less make findings with respect to, prior Commission rulings that commuter costs should not be imposed on freight operations (in the form of a terminal surcharge or otherwise) under the "standards and limitations" of ratemaking under the Interstate Commerce Act.

The Commission also made no findings as to whether a change in the divisions of the railroads participating in movements to or from Long Island was justified, although it is uncontroverted that under Section 15(6) of the Act, the Commission may not prescribe a change in divisions except upon a finding that the existing divisions are "unjust, unreasonable, inequitable or unduly preferential or prejudicial" (49 U.S.C. §15(6)) (App. G, 14g). The Commission is em-

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[7]The Commission found that in 1972, of Long Island's total revenue of $94.3 million, "only about $9.2 million was derived from freight service." (App. B, 51b). Thus, over 90 percent of Long Island's revenue was derived from commuter operations. Of Long Island's 7,177 total employees, 808 were freight employees and 6,369 (89 percent) were passenger employees (Long Island Exhibit No. 4, Ex Parte No. 299, Sub-No. 1, page 3).

The Commission made no finding as to whether the pension costs incurred by Long Island attributable to Long Island commuter employees under the Railroad Retirement Act were any higher than the pension costs incurred by MTA with respect to its subway or other commuter employees not covered by the Railroad Retirement Act.

powered under Section 15(6) to change divisions only after giving consideration to the relative efficiency of the participating carriers, their revenue requirements, their costs, and other factors. The Commission in this case did not make any finding that the present equal-factor basis of divisions is unjust or unreasonable, and it did not consider any of the factors set forth in Section 15(6), on the theory that such a finding did not have to be made and that such factors did not need to be considered, because the Commission regarded the surcharge as not a part of the joint rate (App. B, 59b). However, the Commission conceded that the terminal surcharge "does not cover any service or privilege to the shipper" (App. B, 55b).

Three Commissioners dissented on the ground that the Commission's decision would disrupt the rate structure and unlawfully change the applicable divisions without making the findings required by Section 15a(4)(c) and Section 15(6) (App. B, 66b, 71b).

By order dated November 23, 1976, the Commission denied a petition for reconsideration and ordered other railroads to incorporate Long Island's 12.5 percent surcharge into their tariffs (App. C, 1c). Three Commissioners again dissented (App. C, 2c, 4c).

The Decision of the Court of Appeals

Railroads other than Long Island instituted review proceedings in the Court of Appeals for the Fifth Circuit. The Commission and Long Island filed briefs in support of the Commission's order. The United States, a statutory respondent (28 U.S.C. §2322), did not attempt to defend the Commission's order.

The Court of Appeals set aside the Commission's order and remanded the case to the Commission (App. A, 16a). The Court did *not* hold that as a matter of law under Section

15a(4)(c) the Commission either could or could not approve a terminal surcharge in the absence of terminal service, or that it could or could not impose commuter costs on freight shippers, and the Court did not reach the issues of whether such rate practices were or were not consistent with the "standards and limitations" applicable to ratemaking (49 U.S.C. §15a(4)(c)). The Court of Appeals held instead that it was "unnecessary" to reach such issues because the Commission failed to give "a reasoned explanation" of its order (App. A, 12a):

> "We cannot read the ICC's report as a reasoned compliance with the statutory mandate. Indeed the ICC's counsel in arguing the case at our bar admitted that the Commission had not made findings specifically responsive to that mandate."

"Illustrative of the deficiencies" in the Commission's report was the Commission's statement that it would rely on the "managerial discretion" of Long Island as to whether all or part of the commuter costs could or should be allocated to interstate freight service (App. A, 12a-13a). The Court of Appeals observed that, as the Commission itself had recognized, such an allocation ordinarily "is not a matter of managerial discretion" of the railroad, and that, "[u]nder the standards and limitations applicable to ratemaking generally, each service is usually required to bear its own costs" (App. A, 13a). The Court of Appeals held that the Commission's report "does not in specific language explicitly interpret the Act" (App. A, 13a), and that findings are lacking which would "support the ICC in making its final determination to accept an exercise of managerial discretion which provides that *all* the increases in railroad retirement taxes shall be borne exclusively by increases in interstate freight rates" (App. A, 13a).

The Court of Appeals also ruled that "another ground" for setting aside the Commission's order was the absence of any findings supporting a modification of the equal factor

basis of divisions (App. A, 14a-15a). The Commission had conceded that no such findings were made, but contended that such findings were not necessary because the terminal surcharge "was an 'add-on' and not a modification of the joint rates" (App. A, 15a). The Court of Appeals ruled that this reasoning was "totally unrealistic," because the surcharge changed the railroads' shares of the joint revenues produced by their joint service (*id.*). The Court of Appeals did *not* hold that the Commission could not change divisions because of the increased retirement tax costs incurred under the 1973 Act; it held rather that the Commission had not even attempted to make the findings required by Section 15(6) of the Act before the Commission could order any change in divisions (*id.*).

The Court of Appeals thereupon remanded the case to the Commission for further proceedings in conformity with its opinion. In so doing, it imposed no procedural requirements or restrictions upon the Commission. Pending the outcome of the reopened Commission proceeding, however, the Court of Appeals provided for the protection of the rights of all parties by permitting Long Island to continue to collect the "terminal surcharge" with the proceeds of the surcharge to be kept in a separate trust fund and made "subject to further just and equitable orders of the Interstate Commerce Commission" (App. A, 16a).[8]

Long Island filed a petition for certiorari on April 24, 1978. The United States, which was a statutory respondent below but which did not defend the Commission's order in the Court of Appeals, has not filed a petition for certiorari. Nor has the Commission filed a petition for certiorari.

[8]This Court, by order of March 6, 1978, granted a stay of the judgment of the Court of Appeals insofar as it required Long Island to keep the surcharge proceeds in a trust fund pending disposition of petition for certiorari (App. E, 1e).

ARGUMENT

Long Island in its petition requests this Court to grant certiorari to review the Court of Appeals' decision setting aside the Commission's order. Alternatively, it requests this Court to grant certiorari and "summarily reverse" the Court of Appeals' order to the extent that it restored the surcharge subject to a trust fund requirement pending the outcome of the proceedings on remand (LI Petition, pp. 10–11, 20). These alternative requests should be denied.

First, the present case totally fails to satisfy the standards established by this Court for review on writ of certiorari. Rule 19 of the Rules of the Supreme Court states that certiorari will be granted "only where there are special and important reasons therefor," as "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or has decided an important question of federal law which has not been, but should be, settled by this court." There is no conflict between the decision of the Court of Appeals below and that of any other court.[9] Nor, because the issues herein pertain to the interpretation of the 1973 Railroad Retirement Amendments under the unique and non-recurring circumstances of Long Island's "terminal surcharge", is any "im-

[9]There is no conflict between the Court of Appeals' imposition of a trust fund requirement upon the proceeds of the terminal surcharge which Long Island has been allowed to collect pending proceedings on remand before the Commission and the decision of the three-judge court in *Long Island R.R. Co.* v. *United States*, 388 F.Supp. 943 (E.D.N.Y. 1974) (App. D). As the three-judge court emphasized, it was concerned solely with the lawfulness of Long Island's terminal surcharge under Section 15a(4)(b) governing interim rate increases "[n]otwithstanding any other provision of law," and "express[ed] no view with respect to its propriety as a final solution to the problem of increased costs" under the entirely different standards of Section 15a(4)(c) applicable to the Commission's final rate determination, which was before the Court of Appeals.

portant question of federal law" involved, as is manifest from the refusal of the United States to defend the Commission's order in the Court of Appeals below and from the election of the United States and the Commission itself not to seek certiorari.

Moreover the Court of Appeals' decision setting aside the Commission's order for lack of reasoned findings as required by Section 15a(4)(c), and for having changed the participating railroads' divisions of joint rates without complying with Section 15(6), is clearly correct. Commission counsel admitted that the Commission had not made findings specifically responsive to the statutory mandate (App. A, 12a); and even Long Island now concedes that the Commission's order had the economic effect of altering existing divisions.

Finally, the Court of Appeals did not construe the "standards and limitations" provision of Section 15a(4)(c) in a restrictive fashion. Nor did it impose any procedural requirements or otherwise tie the Commission's hands during the proceedings on remand,[10] but left the Commission to exercise its judgment and discretion, and to carry out its responsibilities under the statute. Indeed, the Court of Appeals deferred to the Commission's discretion to a far greater extent than necessary. Rather than holding the terminal surcharge invalid as a matter of law (as railroad petitioners had urged), the Court below remanded the case for the Commission to make the necessary findings (App. A, 12a).

1. Long Island asserts that the Court of Appeals set aside the Commission's order because the Commission failed

[10]This is in marked contrast to *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, — U.S. —, 46 U.S.L.W. 4301 (April 3, 1978) (cited LI Petition, pp. 12n. 19, 17).

to determine whether Long Island's commuter service could bear its own costs or whether the State of New York should absorb such costs (LI Petition, p. 14). Long Island then contends that the court below erred both because Section 15a(4)(c) does not require such findings, and because the Commission made such findings (*id.*). The defects in Long Island's argument are three-fold: First, it misstates the basis of the Court of Appeals' decision. Second, it misconstrues Section 15a(4)(c) by totally ignoring the "standards and limitations" provision of that section. And third, it asserts that the Commission made findings which it did not in fact make.

The Court of Appeals' decision was not simply that the Commission had failed to determine whether Long Island's ratepayers, or its owner the State of New York, should pay any part of its increased retirement tax costs of commuter employees.[11] Railroad Respondents had argued that the Commission's order was contrary to the "standards and limitations" applicable to ratemaking (Section 15a(4)(c)) because it approved a terminal surcharge in the absence of any additional terminal service, and because it imposed the costs of local commuter operations on freight operations. Railroad Respondents also argued that the Commission had failed to give a reasoned explanation of its order in both these respects. The Court of Appeals agreed that the Commission had not provided a "reasoned explanation" of its order in either respect, and therefore did not reach the question whether a terminal surcharge could be imposed in the absence of special service, or whether local commuter costs could be imposed on freight shippers, under the "standards and limitations" of ratemaking (App. A, 12a). The issue was

[11]As its opinion makes clear, the Court regarded this as being merely "[i]llustrative of the deficiencies in the ICC report" (*supra*, p. 13).

therefore not limited to whether commuters or the State of New York could pay Long Island's increased commuter costs. It was, instead, whether the Commission had made its final determination as to the terminal surcharge by applying the "standards and limitations" of ratemaking and by making "findings specifically responsive to that mandate" (App. A, 12a). The court below held that the Commission had *not* made such findings, as Commission counsel admitted in argument (*id.*).

Long Island now claims that the Commission was not required to make such findings (LI Petition, p. 14). This claim is contrary to Section 15a(4)(c) and the Administrative Procedure Act. Section 15a(4)(c) specifies that the Commission "shall determine such final rates under the standards and limitations applicable to ratemaking generally" (App. G, 11g). Thus, Congress expressly provided that it was not enough that a proposed final rate increase cover increased retirement tax costs; any rate increase approved by the Commission "shall" be determined by the Commission in accordance with the "standards and limitations" of ratemaking generally. Long Island's argument that the Commission did not have to make findings showing that the rate finally determined complied with the "standards and limitations" of ratemaking totally ignores this express statutory requirement.[12]

Long Island also claims that the Commission did make the required findings (LI Petition, pp. 14, 15). Long Island's argument requires reading findings into the Commission's decision which are simply not there. The Commission's entire "discussion and conclusions" appears in Appendix B,

[12]Long Island's argument likewise ignores Section 8(b) of the Administrative Procedure Act (5 U.S.C. §557(c)), which requires that the agency decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ."

51b–60b. No reference to the "standards and limitations" of ratemaking appears in the Commission's discussion, and no findings are made as to their application in this case.

The argument of Railroad Respondents that Long Island's terminal surcharge should not be approved in the absence of special terminal service was totally ignored by the Commission.[13]

The argument of Railroad Respondents that the terminal surcharge was improper because it would impose local commuter costs on freight operations (with the largest amount being imposed on operations farthest from Long Island) was brushed aside by the Commission with the observation that whether such increased commuter costs could or

[13]The Commission has long held that permanent surcharges will not be permitted except where the carrier provides terminal or other special service. *Passenger Fares and Surcharges*, 214 I.C.C. 174, 243 (1936); *Increased Freight Rates, 1951*, 281 I.C.C. 557, 638 (1951); *Surcharges, New York State*, 62 M.C.C. 117, 133 (1953); *Surcharge on Small Shipments within Central States*, 63 M.C.C. 157, 197 (1954); *Ex Parte No. 292—Increased Freight Rates and Charges, Southern and Western Railroads, 1973*, 344 I.C.C. 344, 346 (1973); *Ex Parte No. 311—Effect of Modifying Proclamation No. 3279 and Other Anticipated Energy Conservation Measures on the Operations of Carriers Subject to the Interstate Commerce Act*, 350 I.C.C. 563, 572 (1975).

In two cases, moreover, the Commission has flatly rejected efforts by Long Island to apply special surcharges in the absence of special terminal service. *Less Than Carload Handling Charge, Long Island Rail Road Company*, 308 I.C.C. 283, 288 (1959); *Car Turning Charges At Points on Long Island, N.Y.*, 332 I.C.C. 795, 799–800 (1969), *aff'd, Long Island R.R. Co.* v. *United States*, 307 F.Supp. 988 (E.D.N.Y. 1969). *See also Switch Connection Charge at Bethpage, N.Y., Long Island Railroad*, 355 I.C.C. 201, 210–215 (1977).

The Commission's failure to explain its departure from its own "prior norms" required that its order approving Long Island's terminal surcharge be set aside. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652–53 (1954); *Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973).

should be borne by commuters through increased rates was "a question of managerial discretion more properly directed in the first instance to the MTA, which operates the Long Island" (App. B, 56b). The Commission's treatment of this issue was essentially that: (1) Long Island needs money to cover its increased commuter retirement tax costs; and (2) Long Island's management, the MTA, would prefer, in its "managerial discretion," to recover such revenues from freight traffic, especially that moving to and from points farthest from Long Island, rather than local commuters or taxpayers. This treatment was flatly contrary to the well-established ratemaking principle that (unlike the costs of intercity passenger service, which uses facilities in common with freight service) the costs of suburban commuter service are solely related to commuter service and should not be subsidized by freight operations—but instead should be borne by local commuters or be subsidized by governmental authorities.[14]

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[14] *See Baltimore & O.R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 93–94 (1968); and *King* v. *United States*, 344 U.S. 254, 265 (1952). *See also Increased Railway Rates, Fares, and Charges, 1942*, 255 I.C.C. 357, 395 (1943); and *Penn Central Fare Revision—1969*, 335 I.C.C. 720, 724 (1970).

In *Chicago South Shore and South Bend Railroad Discontinuance of all Passenger Train Service* (Finance Docket No. 28322) (Order dated March 28, 1977), the Commission (Division 3) held that under "Federal policy on mass transit," any operating deficits not covered by Federal assistance are "to be made up either by the state or local communities involved" (Report, p. 49), the principle underlying this policy being that such deficits should be borne by appropriate governmental authorities and should *not* be imposed on freight operations. See also *Illinois Central R. Co. Suburban Fares, 1958*, 305 I.C.C. 221, 230 (1958), and *Illinois Central Gulf R. Co.—Electric Commuter Train Fares*, 351 I.C.C. 653, 665 (1976). In so holding, the Commission reaffirmed a standard of ratemaking to

(footnote continued on next page)

Long Island now attempts to defend the Commission's decision by pointing out that the Commission cited cases in which it had held that where intercity passenger service "inevitably and inescapably" cannot bear its own costs, then such passenger service deficits could be considered in determining the level of freight rates. This argument suffers from two fatal defects. One is that in the instant case, the Commission made *no* findings that Long Island commuters could not bear the burden of the increase in commuter costs resulting from the retirement tax increase, or that any such increases could not be subsidized by local governmental authorities. Thus, the Commission made no finding as to what the commuter fare level presently is, or how much such fares would have to be increased to cover the increased retirement taxes. Indeed, the Commission stated that it would *not* consider "[w]hether the passenger fare structure of the LIRR should bear some of this increased pension cost" because it incorrectly regarded this as "a question of managerial discretion more properly directed in the first instance to the MTA. . . " (App. B, 56b).

Moreover, as the Court of Appeals appointed out (App. A, 14a), the Commission completely failed to address itself to

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which it had long adhered. Thus in *Multiple Fares in Chicago Area, Illinois*, 281 I.C.C. 537, 551 (1951), the Commission held that:

> "The fact that [petitioner's] suburban operations are largely separate and distinct is *all the more reason why they should stand on their own feet* and not lean for support on its interstate freight operations. See *Colorado* v. *United States*, 271 U.S. 153." (Emphasis supplied.)

And in *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 483 (1959), the Commission again held:

> "That where the railroads are unable to operate a particular local or commuting service at a profit, and where such service is essential to the community or communities served, that steps be taken by State and local authorities, or both, to provide the service, paying the carrier the cost plus a reasonable profit."

the questions of whether, if commuter fares were not raised, the increased costs could or should be borne by Long Island's owner, the State of New York. The governmental authorities in New York, for their own reasons, have followed a practice of keeping suburban commuter rates low and making up any commuter deficits through subsidies. Since 1966, MTA has operated Long Island as a subsidiary corporation and has granted Long Island sufficient funds to make up Long Island's overall annual operating deficits. Such deficits have been incurred at the discretion of MTA, because that agency is empowered by statute to set fares at a level necessary to maintain itself and its subsidiary corporations on a self-sustaining level. N.Y. Publ. Auth. Law §1266(3). Long Island essentially concedes that no findings addressing this point were made by the Commission (LI Petition, p. 17).

In sum, no consideration whatever was given to the question as to whether Long Island commuters or the appropriate governmental authorities "inevitably and inescapably" could not bear Long Island's increased retirement tax costs.[15]

A separate fatal defect in Long Island's argument is that the cases cited by the Commission involved *intercity* passenger service, which makes use of facilities in common with freight service. Because such common costs would have to be borne by freight shippers even if there were no intercity passenger service, it was at one time considered appropriate that interstate passenger deficits produced by such common costs be borne by freight operations. *See Baltimore & O. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 93–94 (1968); *King* v. *United States*, 344 U.S. 254, 265 (1952). However, because suburban commuter service is for the most part distinct from freight service, there has never been any basis in law, Commission precedent, or common sense to impose the burden of commuter deficits on freight operations. The Commission's decision refers to *no* case in which the Commission has ever held, or even suggested, that solely-related suburban commuter deficits should be imposed on freight operations.[16]

Apart from its mischaracterization of the Commission's decision, Long Island further errs in suggesting that its 12.5 percent terminal surcharge should be upheld because Long Island had a *total* operating deficit of $108 million in 1974 (LI Petition, p. 16). This case is not about Long Island's total

[15]Long Island suggests that this defect is somehow cured by the Commission's finding that railroads other than Long Island had not excluded the increased retirement tax costs attributable to their commuter employees in computing the amount of their freight rate increases (LI Petition, p. 16). However, as Long Island expressly conceded before the Court of Appeals, whereas it is predominantly a commuter line, the commuter operations of other railroads are relatively insignificant (Brief May 9, 1977, p. 12, n.5): "Admittedly *unlike the LIRR*, the passenger operations of other railroads are a *minor item* when compared to their freight operations" (emphasis supplied). Moreover, as the Commission found, railroads other than Long Island deducted "subsidies from Amtrak, Metropolitan Transit Authority (MTA) and other public bodies" in computing their increased retirement tax costs (App. B, 56b).

[16]Under previous Commission policy and practice, although solely related suburban commuter costs were not imposed on freight operations in the form of higher freight rates (see authorities cited *supra*, pp. 20–21), there was a question as to whether *intercity* passenger service deficits should be imposed on freight shippers in the form of higher freight rates. Congress, in the Rail Passenger Service Act (45 U.S.C. §501 *et seq.*), resolved that question when it decided that intercity passenger service deficits should be subsidized by "Federal financial assistance" (Section 101) rather than freight operations, and created Amtrak to accomplish this purpose. The Commission's decision in the present case is thus particularly incongruous because it would for the first time place the burden of solely-related commuter costs on freight operations, even though Congress has now decided that even intercity passenger service deficits should be subsidized by the government in order to relieve freight operations of that burden.

passenger deficit, or whether that deficit should be made up by New York commuters or New York taxpayers. No one has proposed that the total deficit be borne by freight operations. The issue in this case is whether the $6 million in retirement tax increases, 90 percent of which was attributable to commuter service, should be borne entirely by freight operations. Long Island's "evidence" cited in its Petition (p. 16) as to its *total* passenger deficit and the amount of commuter fare increase needed to eliminate that total deficit was and is irrelevant to the question of who should bear the much smaller cost of the retirement tax increases for commuter employees.[17]

2. Long Island also argues that the Court of Appeals misapplied Section 15(6) governing divisions (LI Petition, p. 17 *et seq.*). In its brief to the Court of Appeals, Long Island argued that the Commission's order authorizing the terminal surcharge did not change the existing divisions (Brief May 9, 1977, pp. 27 *et seq.*). The Court of Appeals held that the terminal surcharge was a "modification of the joint rates" (rather than an "add-on") and therefore "in economic terms" changed the divisions of the joint rates (App. A, 15a). Long Island now concedes that the Commission's order did have "the economic effect of altering the division of total transportation charges" (LI Petition, p. 18).[18] Long Island argues,

[17]If Long Island would have to increase its commuter fares 100 percent to make up its total passenger deficit of $108 million (as claimed, LI Petition, p. 16), then only a 5 percent increase in fares would be needed to make up the increased retirement tax expenses for commuter employees. The Commission gave no consideration to whether such a relatively modest fare increase was either fair or feasible.

[18]Long Island leaves to a footnote the same "technical" argument here that the Court of Appeals rejected (LI Petition, p. 19, n. 33)—namely, that the terminal surcharge is not part of the joint rate, so that Long Island's retention of the surcharge does not alter

(footnote continued on next page)

however, that the Commission had authority under Section 15a(4)(c) to change the divisions without making the findings required under Section 15(6) (governing changes in divisions) (LI Petition, p. 18). This argument—which was *not* made to the Commission or to the Court of Appeals below—is unfounded. Nothing in Section 15a(4)(c) or any other part of the 1973 amendments to the Act authorized the Commission to modify existing divisions without complying with Section 15(6)—which by its terms applies to all Commission orders changing divisions (App. G, 14g).

The legislative history of Section 15a(4) to which Long Island refers (LI Petition, p. 18), shows that Congress contemplated that when the Commission determined what the final rates would be under Section 15a(4)(c), some carriers might not require as large a rate increase as others and some carriers might be able to offset increased retirement tax costs by other means.[19] Such "variability of application" was not precluded by the "standards and limitations" of rate making.[20]

the division of "that rate." However, in the very next sentence Long Island concedes that the joint service of all participating railroads, rather than any special terminal service by Long Island, is what produced the total rate paid by the shipper, *including* the surcharge. The Court of Appeals properly rejected the "technical" argument that the surcharge is not part of the joint revenue subject to divisions as "totally unrealistic" (App. A, 15a).

[19]Hence the Senate Committee concluded (S. Rep. No. 93-221, 93d Cong., 1st Sess. 3 (1973)):

> "While the present financial conditions of some carriers may justify 'pass through' of the expense increases, this may not be the case with all carriers. Prompt consideration of requests for rate increases is needed, but there is no demonstrated need that such increases must be automatically granted."

[20]Thus the Commission authorized a somewhat lower rate increase for traffic moving within the South than for traffic moving within the West and Northeast (App. B, 13b).

Nothing in the Act or in the legislative history of the 1973 amendments, however, even remotely suggests that Congress intended to authorize changes in the divisions of revenues among carriers without compliance with the requirements of Section 15(6). Certainly no such intention can be inferred from Congress' recognition of the fact that "Commission authorizations for rate increases 'do not . . . preclude variability of application. . . .' " S. Rep. No. 93-221, 93d Cong., 1st Sess. 3 (1973) [quoting *Ex Parte No. 281, Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288 (1972)]. Indeed, it is totally inconsistent with Congress' recognition that some railroads might be able to offset increased retirement tax costs by other means and thus not require rate increases of the same magnitude as other railroads, to argue that every railroad must be permitted to offset the entirety of its increased retirement tax costs even if this would do violence to the "standards and limitations" set forth in the Interstate Commerce Act and to which Section 15a(4)(e) expressly requires adherence. As the Senate Committee stated, " 'The public interest and the maintenance of a lawful rate structure must prevail over respondent's revenue need, however pressing.' " *Id.*

Long Island also suggests—again for the first time—that the Court of Appeals made "findings on the divisions point" which were somehow sufficient to meet the requirements of Section 15(6) (LI Petition, p. 19). Neither the Commission nor Long Island made any such argument before the Court of Appeals, and it is plainly wrong. None of the findings specifically required under Section 15(6) as to the existing divisions, or the relative efficiency of the railroads, of their costs or revenue needs, or the other matters which must be considered in a divisions proceeding, was made.

Southern and Western railroads are not asking anything inequitable (as Long Island contends, Petition, p. 19). They are not asking that they be "permitted to charge rates in excess of those needed to recover their retirement tax obligations" (*id.*). They are asking only to receive their established divisions of revenues on shipments to and from Long Island. The rates (including the surcharge) paid by shippers for service to or from points on Long Island are the same as the rates (without any surcharge) to adjacent points in New York (*supra*, p. 6). Under the Court of Appeals' decision, unless and until findings are made which would support a change in the applicable divisions, the Southern and Western railroads would receive the same divisions (both in percentages and in dollars) on Long Island shipments as on shipments to adjacent points in New York not located on Long Island. They would not have their shares of the joint revenue reduced by Long Island's taking what now amounts to an average division of 25 percent rather than the 16 percent to which it is entitled for its 2 percent of the service (*see supra*, p. 7).[21]

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[21]Long Island's contention that it is pitted against railroads which are "most profitable" (LI Petition, p. 12) is wrong as well as irrelevant. Both the Commission and Congress have recognized that rates of return throughout the railroad industry have been dangerously low. *See, e.g.*, H.R. Rep. No. 94-725, 94th Cong., 1st Sess. 54 (1975)). *Ex parte No. 343—Nationwide Increased Freight Rates and Charges, 1977* (Order dated November 10, 1971, p. 11). *See also Ex parte No. 271—Net Investment—Railroad Rate Base and Rate of Return* (Report of the Coordinator), 345 I.C.C. 1494, 1565 (1976).

It would be directly contrary to stated Congressional policy to attempt to alleviate the problems of a railroad such as Long Island by requiring that its operations be subsidized by railroads elsewhere in the country which themselves are earning inadequate returns. Congress' response to the plight of the bankrupt Northeastern railroads such as Penn Central has been to create ConRail and to provide massive subsidies in an attempt to make it a prof-

(footnote continued on next page)

3. Long Island's petition asks that if this Court does not grant certiorari to review the Court of Appeals' decision, "in the alternative" it should issue the writ and "summarily reverse" that part of the Court of Appeals' decision imposing a trust fund on the surcharge revenues collected during the pendency of the remand proceedings.

Long Island's contention that it should be permitted to collect and use "interim" surcharge revenues at this stage of the proceedings is inappropriate because the Commission has made its "final determination" under Section 15a(4)(c),[22] and

itable concern. At the same time, Congress has sought to avoid similar railroad collapses in the South and West by relieving freight operations of the burden of intercity passenger deficits through the creation of Amtrak (*supra*, p. 23), and by instituting regulatory reforms in the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"):

> "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system so that this mode of transportation will remain viable in the private sector of the economy." 4-R Act §101 (45 U.S.C. §801).

See also 4-R Act Sections 202 and 205 (49 U.S.C. §§1(5), 15a(4)); and S. Rep. No. 94-499, 94th Cong., 1st Sess. 10-11 (1975).

[22]Long Island's contention that the Court of Appeals' imposition of a trust fund requirement somehow contravened the intention of Congress in its enactment of Section 15a(4)(b) and the decision of the three-judge district court in *Long Island R.R. Co.* v. *United States*, 388 F.Supp. 943 (E.D.N.Y. 1974) (App. D), construing the provisions of that section (LI Petition, pp. 9-10), has no relevance to the present situation. Section 15a(4)(b) was not before the Commission in the phase of the proceedings under the Railroad Retirement Amendments as to which judicial review was sought, nor was it before the Court of Appeals.

Moreover, Congress' intention in enacting the Railroad Retirement Amendments in 1973 that the railroads be provided with an

(footnote continued on next page)

the Court of Appeals has held that the surcharge unlawfully changes applicable divisions. If Long Island's request were granted, it would be able to continue to collect and spend divisions revenues which belong to other railroads.

The Court of Appeals could simply have set aside the Commission's order which it found to have been unlawfully entered. If the Court of Appeals had done so, Long Island would not have been permitted to continue to collect and spend the excess divisions it has been collecting but which belong to other railroads. There is no basis, therefore, for any contention that because the Court of Appeals allowed Long Island to continue to collect the surcharge pending the outcome of proceedings before the Commission on remand, the Court of Appeals could not properly require that the surcharge revenues be kept in a separate trust fund on the ground that it would be "equitable" to do so (App. A, 15a).

The trust fund requirement, imposed by the Court of Appeals as an integral part of its order in this case, preserves the positions of all parties—Long Island as well as the other railroads—during the remand proceedings before the Commission (at which time any remaining disputes as to the application of the existing divisions to the surcharge revenues may be resolved and the Commission can decide what rates should be collected in the future). The alternative to continuation of the surcharge subject to a trust fund is not to do away with the trust fund, but rather to set aside the surcharge.

expeditious means of recouping increased retirement tax costs on an interim basis under Section 15a(4)(b) "[n]otwithstanding any other provision of law" until final rate determinations could be made under the wholly different standards of Section 15a(4)(c) requiring compliance with the "standards and limitations" of rate-making, has no bearing whatever upon the situation now existing some 5 years later in which the Commission has made its final rate determination and in which that determination has been found by a reviewing court to have been unlawful.

CONCLUSION

For the foregoing reasons, the alternative requests by Long Island for issuance of a writ of certiorari should be denied.

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May 24, 1978

No. 77-1515

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE LONG ISLAND RAIL ROAD COMPANY, PETITIONER

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. The court of appeals set aside an order of the Interstate Commerce Commission that approved petitioner's 12.5 percent permanent "terminal surcharge" on interstate freight originating or terminating on its rail system. The surcharge was designed to offset an increase in petitioner's federal railroad retirement taxes, pursuant to Title II of the Railroad Retirement Amendments of 1973, Pub. L. 93-69, 87 Stat. 162, which provided special rate adjustment procedures allowing carriers to recoup the additional expenses imposed by Title I of the Act.

The court of appeals held that the Commission failed adequately to articulate its reasons for approving the surcharge in accordance with the standards and limitations normally applicable to ratemaking (Pet. App. 12a-14a). The court also held that the surcharge constituted an unjustified departure from the equal-factor

basis of divisions of joint rates (Pet. App. 14a-15a), and it remanded the case to the Commission. Pending determination of final rates by the Commission on remand, the court authorized petitioner to "restore" and collect the 12.5 percent interim surcharge it had been collecting prior to the Commission's final order,[1] but the court directed that the proceeds be kept "in a separate trust fund * * * subject to further just and equitable orders of the Interstate Commerce Commission" (Pet. App. 16a). The court did not offer any reason for imposing the trust on the funds generated by the surcharge, which previously had been unencumbered.[2]

2. Petitioner argues that the court of appeals misconstrued the Railroad Retirement Amendments of 1973, misapplied Section 15(6) of the Interstate Commerce Act, as amended, 41 Stat. 486, 49 U.S.C. 15(6), which governs the division of joint rates, and improperly directed that the interim terminal surcharge be held in a separate trust fund.

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[1]The interim surcharge had been approved by a three-judge court in *Long Island Railroad* v. *United States*, 388 F. Supp. 943 (E.D.N.Y.). The railroad respondents argue that the 12.5 percent surcharge collected under the court of appeals' order is a new, equitable surcharge rather than the one collected under the order of the three-judge court (Br. in Opp. 15 n. 9, 28-29). But the interim surcharge approved by the three-judge court was to remain effective until a permanent surcharge was in place. Because of the decision of the court of appeals, no permanent surcharge is in place. We therefore believe that petitioner could have continued to collect the interim surcharge whether or not the court of appeals had explicitly authorized it to do so.

[2]On March 6, 1978, this Court stayed the court of appeals' judgment, pending the timely filing and disposition of a petition for a writ of certiorari, "only insofar as the judgment requires [petitioner] to keep in a separate trust fund the proceeds of the interim 12.5 percent terminal surcharge" (Pet. App. 1e).

a. With regard to the construction of the Railroad Retirement Amendments, the court of appeals held only that the Commission failed to explain how it made its decision under the "standards and limitations applicable to ratemaking generally under Part I" as required by Section 15a(4)(c) of the Act (Pet. App. 12a-14a). The court did not reach the railroads' argument that the Commission's decision was contrary to the standards generally applicable to ratemaking, because it concluded that the Commission had not adequately articulated the reasons for its decision. While the court might easily have concluded that the Commission's findings were adequate, the decision does not erroneously construe the Railroad Retirement Amendments.

b. Similarly, although the court held that the Commission departed from the equal-factor basis of the divisions of joint rates without justification, it stated that an "adequate justification may or may not be in the recoupment purpose of the Act of July 10, 1973" (Pet. App. 15a). The court found it unnecessary to resolve the issue because "the ICC has not yet appropriately spoken" (*ibid.*). The Commission remains free under the court of appeals' judgment to reach the same result on remand so long as it explains the reasons for its action. The court's order simply requires further explanation by the Commission; because it is thus limited, neither the Commission nor the United States concluded that it was appropriate to file a petition for a writ of certiorari. The case—at least at the present time—does not present a legal issue concerning rate divisions that requires this Court's resolution.

c. We agree with petitioner that the court of appeals erred in directing the interim terminal surcharge to be held in a separate trust fund pending determination of final rates by the Commission (Pet. App. 16a). In enacting Section 15a(4) Congress intended any interim rate

increases to remain in effect until the Commission approved the permanent increase and to be subject to refund only to the extent the interim rate exceeded the permanent rate.[3] This view is supported by the three-judge court's statement that the purpose of Section 15a(4)(b) is "to assure that railroads were immediately able to recover their increased retirement benefit contributions." *Long Island Railroad* v. *United States, supra*, 388 F. Supp. at 947. The requirement of the court of appeals that the interim charges be held in escrow pending the establishment of the permanent increase therefore violates the intent of Congress. It deprives petitioner of operating revenues that both Congress and the three-judge court have concluded petitioner should receive. The court of appeals, on setting aside the Commission's order, should have restored the parties to the position they occupied before the entry of the Commission's order—in that position petitioner was entitled to collect and spend the 12.5 percent surcharge.

This question is essentially limited to the facts of this case and is thus not sufficiently important to warrant plenary review by this Court.[4] We nevertheless believe the court of appeals' escrow requirement is plainly incorrect. Because the escrow requirement effectively places the court of appeals in conflict with the three-judge court, and

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[3]The Conference Report on the Railroad Retirement Amendments stated that, once the Commission accepted the interim tariffs for filing, the Commission would have no authority to suspend them pending final determination. H.R. Conf. Rep. No. 93-319, 93d Cong., 1st Sess. 12 (1973).

[4]Section 15a(4) was designed to offset specific retirement tax increases imposed by the Railroad Retirement Amendments. Since the railroads' increased tax costs, except for those of petitioner, were offset some time ago, circumstances like those presented by this case are not likely to recur.

because the escrow requirement may damage the already financially precarious status of petitioner, we believe that it would be appropriate for this Court summarily to reverse the judgment of the court of appeals to this limited extent. Cf. *Ralston Purina Co.* v. *Louisville & Nashville Railroad Co.*, 426 U.S. 476.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed insofar as it orders petitioner to keep in a separate trust fund the proceeds of the 12.5 percent interim terminal surcharge.

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JUNE 1978.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1515

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*
Respondents,

SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND SOUTHERN GOVERNORS' CONFERENCE
Intervenors-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INTERVENORS - RESPONDENTS SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND SOUTHERN GOVERNORS' CONFERENCE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 24, 1978

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PRELIMINARY STATEMENT

The Southeastern Association of Regulatory Utility Commissioners ("SEARUC") and the Southern Governors' Conference ("SGC"), intervenors-petitioners

in the proceedings before the Court of Appeals below, appear in support of the Court of Appeals' decision and urge that the Petition for Writ of Certiorari brought by The Long Island Rail Road Company ("Long Island") be denied.

SEARUC is composed of the commissioners of the regulatory commissions of the Southern States. SGC is the organization of Southern Governors, who meet regularly to consider and take action upon matters that affect the public interest of their States. SEARUC and SGC represent the following states in this proceeding: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

SGC was formed to combat regional discrimination against the South in railroad freight rates, and actively participated in the *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945), and in the landmark case of *New York v. United States*, 331 U.S. 284 (1947), in which this Court confirmed the principle of regional rate equality. SGC and SEARUC were also parties to the proceedings in *Official-Southern Divisions*, 325 I.C.C. 1 (1965), where they successfully argued that the Interstate Commerce Commission's ("ICC") prescription of an increase in the North's divisions was not supported by reasoned findings because the purportedly higher Northern costs of service were improperly inflated by Northern commuter deficits. *Aberdeen & Rockfish R.R. v. United States*, 270 F. Supp. 695 (E.D. La. 1967), *aff'd Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968). SGC and SEARUC intervened in the present proceeding because Long Island's "terminal surcharge" represented another assault on the principle of regional equality and yet another attempt to reduce the divisions of Southern railroads, to the detriment of the Southern economy, in order to subsidize local suburban commuter operations in the North.

ISSUE PRESENTED

The issue before this Court is whether the Court of Appeals erred in setting aside an order of the ICC permitting Long Island to recoup increased retirement tax costs attributable almost entirely to its local commuter operations by means of a "terminal surcharge" on interstate freight traffic on the ground that the ICC's order unlawfully changed Long Island's share or "division" of joint rate revenues vis-a-vis railroads in other regions in the absence of findings necessary to support that result.

SEARUC and SGC contended before the Court of Appeals below that railroad retirement tax costs incurred by a state-owned commuter railroad in providing local transportation service to commuters who work in New York City and live on Long Island cannot, consistent with Section 15(6) and Section 15a(4)(c) [now Section 15(a)(6)(c)] of the Interstate Commerce Act and with the decision of this Court in *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968), be imposed on the shippers and economies of other areas of the country through the device of a "terminal surcharge" which in economic reality changes the divisions which Southern railroads receive on freight traffic to and from Long Island.

The Court of Appeals agreed and held that Long Island's terminal surcharge changes the joint rates and

divisions of the railroads serving the North and South (App. A 15a). The Court of Appeals recognized that under the existing uniform rate and divisions structure established by the ICC in *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945), and affirmed by this Court in *New York v. United States*, 331 U.S. 284 (1947), "the Northern and Southern railroads receive the same share of revenue for the same amount of service." (App. A 5a) and that this Court in *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968) "made it clear that a departure from the equal-factor basis of divisions of joint rates can be allowed only on the basis of specific findings" (App. A 14a-15a).

It having been conceded in the Court of Appeals below by counsel for the ICC that no such findings had been made by the ICC in the case before it, the Court of Appeals rejected as "totally unrealistic" the contention that such findings were not required because Long Island's terminal surcharge was an "add-on" charge and not a modification of the divisions (App. A 15a).

ARGUMENT

In this Court, Long Island essentially abandons the argument which it made before the ICC and Court of Appeals (and which the Court of Appeals rejected as "totally unrealistic") that its terminal surcharge is an "add-on" charge rather than a change in divisions. Long Island now expressly concedes that the ICC approval of the surcharge had "the economic effect of altering the division of total transportation charges" (Petition for Certiorari, p.18).

Instead, Long Island now seeks to defend its terminal surcharge on the grounds that the pertinent provisions of the Railroad Retirement Amendments of 1973 somehow relieved the ICC of its obligation to make the findings required by Section 15(6) of the Interstate Commerce Act and by the holding of this Court in *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968) (Petition for Certiorari, p. 18), and, alternatively, that the ICC made findings "on the divisions point" which were sufficient to justify a change in Long Island's divisions (Petition for Certiorari, p. 19). These arguments, which have not hitherto been made in this proceeding either by Long Island or by the I.C.C.,[1] are totally without merit.

First, there is nothing whatever either in the provisions of the Railroad Retirement Amendments or in their legislative history which suggests that in approving a final rate increase under Section 15a(4)(c) to permit the nation's railroads to recoup increased retirement tax costs, the ICC could change existing divisions without compliance with Section 15(6) of the Interstate Commerce Act or with the decisions of this Court construing Section 15(6). Indeed, Section 15a(4)(c) — by the clearest possible contrast to Section 15a (4)(b), which provided for approval of interim rate increases "notwithstanding any other provisions of law" — requires that such final rates be determined "under the standards and limitations applicable to ratemaking generally [under the Act]." Hence, Long Island's claim that "[t]he ICC's mandate in this case permitted it to approve permanent rate increases that have the economic effect of altering the division of total

[1] Although a statutory respondent before the Court of Appeals under 28 U.S.C. § 2322, the United States did not seek to defend the ICC's order there, and the ICC has not sought review of the Court of Appeals' decision before this Court.

transportation charges" (Petition for Certiorari, p. 18) is directly contrary to the express statutory terms of Section 15a(4)(c).

Second, far from making findings "on the divisions point" adequate to justify a change in Long Island's divisions, the Commission made *none* of the findings required by Section 15(6) of the Interstate Commerce Act, which provides the sole and exclusive means whereby the ICC may prescribe a change of divisions. Section 15(6) authorizes the ICC to prescribe changed divisions *only* when it has given "due consideration" to a number of specific factors, including "the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses . . . and the importance to the public of the transportation services of such carriers." Indeed, as the Court of Appeals observed, the ICC did not even *attempt* to make such findings because of its erroneous assumption, no longer defended even by Long Island, that the surcharge did not constitute a modification of the joint rates.

Nor did the ICC make any findings to justify the imposition of retirement tax costs related solely to local suburban commuter operations onto the freight shippers and economies of other areas of the country as required by the decision of this Court in *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968). In that decision, this Court affirmed the judgment of a three-judge district court that the ICC could not impose the burden of Northern commuter costs on the South in the absence of findings "rationalizing the conclusion that suburban passenger deficits reflecting costs not common to freight service, but 'solely related' to suburban passenger service, can or should be treated as a cost of North-South freight traffic," *Aberdeen & Rockfish R.R. v. United States*, 270 F. Supp. 695, 708 (E.D. La. 1967), and held that if such a discriminatory shifting of Northern commuter costs were to be permitted "the class rate discrimination in favor of the North and against the South which we condemned in *New York v. United States*, 331 U.S. 284, could well flourish in another form." *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87, 92(1968). It is undisputed that by far the greater portion of Long Island's increased retirement tax costs are solely related to its commuter operations which produce more than ninety percent of its total revenues (Petition for Certiorari, p.4). And it is also undisputed that Long Island's terminal surcharge imposes such costs upon the movement of freight in the South and in other regions of the country. Yet the ICC's report is totally silent as to what, if anything, could justify such a result and thus fails to meet the requirement of "rationalizing" findings affirmed by this Court.

In its Petition, Long Island also attacks the escrow requirement imposed by the Court of Appeals as a condition to Long Island's continued collection of its terminal surcharge revenues on an "interim" basis pending remand to the ICC and, in the alternative, to its request for writ of certiorari to review the decision of the Court of Appeals, requests this Court "summarily [to] reverse the decision of the Court of Appeals insofar as that decision deprives [Long Island] of the use of the proceeds of the interim surcharge" (Petition for Certiorari, p. 2).

To grant the alternative relief requested would be

fundamentally unfair. It would permit Long Island to continue to benefit from what the Court of Appeals already held to be an unlawful inflation in its divisions and thus to continue unlawfully to burden the economy of the South. The Court of Appeals required Long Island to keep its "interim" surcharge revenue in a trust fund as an equitable alternative to simply striking down the surcharge found to be unlawful. This arrangement protects all prospective claimants to the surcharge revenues collected pending a final disposition by the ICC on remand, including Long Island. Long Island is a beneficiary of the action of the Court of Appeals, and should not now be heard to complain of an equitable condition that enables Long Island to continue to collect its unlawful surcharge pending further proceedings before the ICC on remand.

CONCLUSION

For the foregoing reasons, Long Island's Petition for Writ of Certiorari to review the decision of the Court of Appeals, and its request in the alternative that the trust fund requirement imposed by the Court of Appeals on the interim collection of surcharge revenues be summarily reversed, should be denied.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONER THE LONG ISLAND RAIL ROAD COMPANY

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REPLY FOR PETITIONER THE LONG ISLAND RAIL ROAD COMPANY

The Aberdeen Opposition [1] to the LIRR Petition misconceives the issues and misstates the facts in this case. The issues are two: (1) Is the LIRR entitled to collect

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[1] The Brief in Opposition for Respondents Aberdeen & Rockfish Railroad Company, *et al.*, dated May 24, 1978, is herein called the "Aberdeen Opposition." The Brief of Intervenors-Respondents Southeastern Association of Regulatory Utility Commissioners and Southern Governors' Conference in Opposition to Petition for Writ of Certiorari, dated May 24, 1978, is herein called "SEARUC Opposition." References to appendices in the form "App. ——" are to the appendices accompanying LIRR's Petition, filed April 24, 1978.

and use the proceeds of its interim terminal surcharge until the validity of the permanent terminal surcharge is finally adjudicated? and (2) Is the LIRR entitled to collect its permanent terminal surcharge under the Railroad Retirement Amendments of 1973 ("RR Amendments")?

With respect to the first issue—the LIRR's right to use the proceeds of its interim terminal surcharge—there is a direct conflict between the decision of the three-judge court and that of the Court of Appeals. The three-judge court had held that the LIRR could use the proceeds of its interim terminal surcharge until there was a final determination on the LIRR's permanent rate increase.[2] The Court of Appeals ordered the LIRR "to restore . . . the interim terminal surcharge" but deprived the LIRR of the use of the surcharge revenues by imposing a trust fund on them.[3] Such a conflict renders this case worthy of this Court's review.[4] Indeed, this Court has already taken extraordinary action to preserve this issue for review by granting, in part, the LIRR's Application for Stay.[5] Given the language of the statute,[6] its legislative history[7] and the final decision of the three-judge court,[8]

[2] *Long Island RR.* v. *United States*, 388 F. Supp. 943 (E.D.N.Y. 1974) (App. D).

[3] 565 F.2d at 335 (App. A 16a).

[4] The Aberdeen Respondents' attempt to distinguish the two decisions (Aberdeen Opposition at 15 n.9) is incomprehensible. Since the Court of Appeals directed the LIRR "to restore the *interim* rates pending a determination of the final rates" and explicitly imposed the trust fund on "the 12.5 percent *interim* terminal surcharge" (565 F.2d at 335 (App. A 15a-16a) (emphasis added)), the Court of Appeals had to be acting under and governed by Section 15a(4)(b), not under Section 15a(4)(c), as the Aberdeen Respondents suggest.

[5] Order of this Court, dated March 6, 1978 (No. A-688) (App. E 1e).

[6] 49 U.S.C.A. § 15a(6)(b) (Supp. 1977) (App. G).

[7] LIRR Petition at 10 n. 15.

[8] *Long Island RR.* v. *United States*, 388 F. Supp. 943 (E.D.N.Y. 1974) (App. D).

the LIRR suggested that it would be appropriate for this Court summarily to reverse the Court of Appeals on this issue. The Federal Respondents agreed and join the LIRR in requesting summary reversal on this issue.[9] Neither Opposition offers any reason—except an irrelevant "divisions" argument[10]—to the contrary.

With respect to the second issue—the validity of the ICC's approval of the LIRR's permanent terminal surcharge—the Aberdeen Respondents argue that the ICC did not adequately explain why the LIRR could impose a permanent terminal surcharge to recoup its increased railroad retirement taxes. The Aberdeen Respondents can make this argument only by ignoring, as the Court of Appeals ignored, the explicit findings made by the ICC.

The Aberdeen Respondents identify only two respects in which the ICC allegedly failed to provide a "reasoned explanation": They claim the ICC failed to explain (1) why "a terminal surcharge could be imposed in the absence of special service," and (2) why the LIRR's increased railroad retirement taxes could not be recouped through passenger fare increases.[11]

[9] Memorandum for Federal Respondents, filed June 8, 1978, at 4-5; *see* Memorandum for the United States and the Interstate Commerce Commission, filed in this Court on March 1, 1978, at p. 2 n.2, p. 3 n.6.

[10] The Aberdeen Respondents' "divisions" argument is plainly irrelevant to the trust fund issue. The text and the legislative history of the RR Amendments make it clear that railroads were not to be deprived of the use of interim rates under 49 U.S.C.A. § 15a(6)(b) (Supp. 1977). See LIRR Petition at 10 & n.15. If the interim rates are ultimately found to be too high, refunds are to be paid to shippers, none of whom is a party to this proceeding, not to other railroads. Thus, there is no basis for the Aberdeen Respondents' assertion that the Court of Appeals' trust fund order is necessary to protect the parties to this proceeding. Aberdeen Opposition at 29.

[11] Aberdeen Opposition at 17. The Aberdeen Respondents assert, as did the Court of Appeals, that these alleged failures to provide a "reasoned explanation" are "merely '[i]llustrative of the deficiencies

Contrary to these Respondents' assertions, the ICC did explain its action in each of these respects. The ICC explicitly found that the LIRR was "unique" and would obtain less than five percent of the revenue needed to offset its increased retirement tax obligations by joining in the general freight rate increase allowed other railroads. 350 I.C.C. at 711 (App. B 51b). The ICC also recognized that a general rate increase of more than 37.5% in all line-haul rates would be required if the LIRR were to recoup its increased costs solely from a general rate increase. 350 I.C.C. at 706 (App. B 44b). The ICC was aware that the only other realistic alternative—pooling of revenues from a general surcharge—was acceptable to the LIRR but was opposed by the Aberdeen Respondents. 350 I.C.C. at 676-77, 708 (App. B 6b, 48b). These factors, which were recited by the ICC,[12] unequivocally demonstrate that, if the LIRR is to recover its increased railroad retirement taxes from freight rates, it has to do so through some kind of a surcharge.[13]

On the question whether the LIRR could generate the revenues needed to offset its increased retirement taxes from passenger fares, the Aberdeen Respondents assert: "[T]he Commission made *no* findings that Long Island

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in the ICC report'" (Aberdeen Opposition at 17 n.11, *quoting* 565 F.2d at 334 (App. A 12a). In attempting to rely on other alleged but undisclosed deficiencies in the ICC decision, the Aberdeen Respondents seem oblivious to the requirement that courts articulate the basis for upsetting an administrative order.

[12] The Aberdeen Respondents try to distinguish between the "discussion and conclusions" section and other sections of the ICC decision. Aberdeen Opposition at 18-19. There is, of course, no requirement that the ICC set forth its findings or the reasons for its action under any particular headings in its decision.

[13] Although the Aberdeen Respondents try to give the impression that the majority of the country's railroads oppose the LIRR surcharge, the facts plainly show otherwise. Conrail has agreed to the LIRR surcharge, and Conrail-LIRR shipments constitute far more carloads than the Southern-LIRR and Western-LIRR traffic combined.

commuters could not bear the burden of the increase in commuter costs resulting from the retirement tax increase." Aberdeen Opposition at 21 (emphasis in original). The Aberdeen Respondents simply ignore the ICC's explicit findings:

> In many general increase proceedings, we have held that if the passenger service, inevitably and inescapably, could not bear its direct costs or its share of joint or indirect costs, such passenger deficit must be taken into account in adjustment of freight rates and charges. *We reach the same conclusion in regard to the terminal surcharge of the Long Island*, and find that there is nothing unlawful in using it to offset its total increased retirement taxes, including those of employees engaged in commuter and other passenger service. 350 I.C.C. at 715 (App. B 57b) (emphasis added).

It is difficult to imagine how the ICC could have been more explicit in finding that the LIRR's "commuter and other passenger" service "inevitably and inescapably, could not bear its direct costs or its share of joint or indirect costs." And the Federal Respondents agree, arguing that the ICC findings were "easily . . . adequate."[14]

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[14] Memorandum of Federal Respondents at 3. The Federal Respondents, while urging summary reversal of the "trust fund" order and agreeing with the LIRR that the Court of Appeals erred on the permanent surcharge, assert that the latter issue does not meet the requirements for plenary review, *id.* at 3, 4. They are, we submit, mistaken. The Court of Appeals decision is in direct conflict with the decision of another federal court; it decided a question of first impression under a federal statute; and it departed from accepted standards of review by ignoring the findings of an administrative agency and substituting its own judgment for that of the agency.

While we agree with the Federal Respondents that the ICC "remains free . . . to reach the same result on remand," Memorandum for Federal Respondents at 3, the administrative process is seriously undermined and regulated enterprises are injured when courts of appeals ignore agency findings and substitute judicial preference for administrative expertise. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, —— U.S. ——, 46 U.S.L.W. 4301, 4310 (U.S. April 3, 1978) (No. 76-419).

Perhaps recognizing that they ought to do more than assert that the ICC did not make findings that it plainly did make,[15] the Aberdeen Respondents offer two "red herrings." First, they attempt to distinguish intercity passenger service from commuter service. Aberdeen Opposition at 22-23. Whatever the validity of this distinction as a general proposition, it has no force here.[16] The increased retirement taxes at issue in this case were imposed on LIRR's "commuter and other passenger service" solely because of the LIRR interstate freight operations. Thus, such added costs of commuter service are inextricably interwoven with the LIRR's freight operations, and are not "distinct" as the Aberdeen Respondents erroneously suggest.

Second, the Aberdeen Respondents argue that the ICC accorded too much deference to LIRR "managerial discretion." Aberdeen Opposition at 20-21. Given its express findings that (1) the LIRR passenger service "inevitably and inescapably" could not bear its joint or indirect costs, (2) the LIRR passenger deficit was over $100 million per year, and (3) the LIRR also conducts its freight

[15] The Aberdeen Respondents also complain that the ICC did not cast its findings in the precise "standards and limitations" language of the statute. Aberdeen Opposition at 17-19. But such specificity was not necessary. See *Minneapolis & St. L. Ry.* v. *United States*, 361 U.S. 173, 193 (1959) ("Again, although the Commission made no specific finding upon that contention it did consider and discuss it, and we think the law required no more.").

[16] The Aberdeen Respondents' acknowledgement that they included the increased railroad retirement taxes attributable to their commuter employees in their general freight rate increase (Aberdeen Opposition at 22 n.15) is inconsistent with their legal position that it is inappropriate for the LIRR to recover such costs through freight rates. Moreover, the inconsistency is not alleviated because such increased retirement taxes were "minor items" for the southern and western railroads. The record shows that items considered "minor" or "small" in relation to the southern railroads ($2.2 million) would pay more than one third of the LIRR's aggregate increase in retirement taxes. See, *e.g.*, 350 I.C.C. at 676-77 (App. B 6b).

operations at a multimillion dollar annual deficit, the ICC was required to allow the LIRR some "managerial discretion" under the RR Amendments.[17] Moreover, the Aberdeen Respondents have precious little basis to complain about the MTA's "managerial discretion" so long as the MTA and the State of New York *subsidize* the LIRR's *freight* operations as they have continued to do even with the terminal surcharge.

Most of the Oppositions are devoted to a lengthy argument based on the law of "divisions" under Section 15(6) of the Interstate Commerce Act, 49 U.S.C.A. § 15(6) (Supp. 1977)—an argument that is irrelevant because it is predicated on a mischaracterization of the Court of Appeals decision. The Court of Apeals did not hold, as the Aberdeen Respondents suggest, that "the Commission had not . . . [made] the findings required by Section 15(6) of the Act." Aberdeen Opposition at 14. In fact, Section 15(6) is nowhere cited in the Court of Appeals decision. Instead, the Court of Appeals held that the LIRR surcharge had the "economic effect" of altering the allocation of total transportation charges, and that the ICC had failed to make findings justifying that effect.[18] This distinction is critical because it determines what issue is presented for review. The issue is not whether the find-

[17] In enacting the RR Amendments Congress rejected a provision that would have made interstate rate increases "concurrently effective on intrastate shipments" (H.R. Rep. No. 93-319, 93d Cong., 1st Sess. 12-14 (1973)) and severely restricted the ICC's ability to overturn decisions of railroad managers and state officials regarding intrastate rates. 49 U.S.C.A. § 15a(6)(d)(C) (Supp. 1977), Pub. L. No. 93-69, § 201(4)(d)(C), 87 Stat. 167 (1973) (App. B).

[18] 565 F.2d at 335 (App. A 14a-15a). Of course, total transportation charges are often comprised of other elements in addition to the line-haul charges and are thus not always split strictly according to divisions. Moreover, both the Aberdeen Respondents and the Court of Appeals seem to suggest that "equal-factor" divisions are universal. They are not. The western railroads, for example, generally get inflated divisions.

ings required by Section 15(6) were made;[19] the issue is what findings under the RR Amendments justify a final rate decision that has the "economic effect" of altering the allocation of total transportation charges, but does not in fact alter the existing divisions of joint rates.[20]

Since the Aberdeen Respondents concede that the ICC had authority to deviate from general rate increases in fulfilling its responsibilities under the RR Amendments,[21] *a fortiori* they are logically forced to concede that the RR Amendments authorize the ICC to allow rates that have the economic effect of altering the existing allocation of total transportation charges. The only question remaining is what findings under the RR Amendments are required to support that result. We submit that the ICC findings that the LIRR needed the revenue and could not generate it from increased passenger fares, together with the finding that the needed revenue could not be generated through a general rate increase without a tremendous windfall to other carriers and the refusal of the Aberdeen Respondents to enter into a general pooling arrangement, fully support the result reached by the ICC.[22]

[19] The Aberdeen Respondents are wrong in stating that LIRR "suggests—again for the first time—that the Court of Appeals made 'findings on the divisions point' which were somehow sufficient to meet the requirements of Section 15(6)." Aberdeen Opposition at 26. LIRR has consistently contended that the findings required by the RR Amendments to justify the economic effect of the terminal surcharge were made by the ICC, but that those findings are not the same as the findings required by Section 15(6).

[20] All of the Aberdeen Respondents' examples and graphs notwithstanding, they receive just as many dollars for a haul from point A (off the LIRR system) to point B (on the LIRR system) as they would without the terminal surcharge.

[21] Aberdeen Opposition at 26. The Aberdeen Respondents seem to imply without any substantiation that the LIRR terminal surcharge is somehow inconsistent with the "public interest and the maintenance of the lawful rate structure." It is in the public interest to have a rate to LIRR points approximately equal to the rates to surrounding New York points and the terminal surcharge accomplishes that objective. LIRR Petition at 6. It would be inconsistent with the maintenance of a lawful rate structure for the Aberdeen Respondents to share in the LIRR surcharge because their rates would then exceed not only those needed to recoup their own increased railroad retirement taxes but also the maximum rates allowed by the ICC under the RR Amendments.

[22] Nowhere in their Opposition do the Aberdeen Respondents deny that the southern railroads are in the inequitable position of asserting that they should have the right to retain a windfall because their share of the general rate increase exceeded their increased retirement taxes while they simultaneously argue that the LIRR should not be permitted to recover more than 5% of its increased railroad taxes.

The Aberdeen Respondents also claim that the LIRR's terminal surcharge imposes a greater burden on longer hauls than on shorter ones, but they fail to acknowledge that it was within their power to agree to a general pooling arrangement which would have avoided this allegedly undesirable feature of the terminal surcharge.

CONCLUSION

For the reasons stated above and in its Petition for Certiorari, the LIRR respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals vacating the ICC approval of the LIRR permanent terminal surcharge. In the alternative, the LIRR asks the Court to issue a Writ of Certiorari and summarily reverse the Court of Appeals' "trust fund" order so that the LIRR may continue to use the proceeds of its interim terminal surcharge until there is a final determination on the LIRR's permanent rate increase under the RR Amendments.

Respectfully submitted,

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